No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1961

UNITED STATES OF AMERICA, APPELLANT

v.

RAYMOND J. WISE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Statute involved	2
Question presented	3
Statement	3
Summary of argument	6
Argument:	
Introduction	9
I. Prior to the enactment of the Clayton Act in 1914, it was well established that corporate officials were criminally liable for violations of the Sherman Act committed in their corporate capacity	14
A. Prior to 1914, it was the settled practice of the government to indict corporate officials for violations of the Sherman Act	16
B. The judicial decisions prior to 1914 cast no doubt upon, but on the contrary recognized, the criminal liability of corporate officials for Sherman Act violations committed in their corporate capacity	19
II. The legislative history of the Clayton Act shows that Congress intended Section 14 of the Clayton Act to supplement, but not to supersede or limit, the existing liability of corporate officials under the Sherman Act for antitrust violations committed in their corporate capacities	31

630086—62——1

Argument—Continued Page

III. The post-1914 criminal enforcement of the Sherman Act, the judicial decisions, and the 1955 increase in the Sherman Act's criminal penalties, all show that Section 14 does not provide the exclusive method for prosecuting corporate officials for antitrust violations 48

A. The government, after enactment of the Clayton Act, continued to prosecute corporate officials under the Sherman Act 49

B. The judicial decisions subsequent to the enactment of the Clayton Act have upheld the prosecution of corporate officials under the Sherman Act 51

C. The action of Congress in 1955 in increasing the maximum fine under the Sherman Act confirms that corporate officials may be prosecuted under that Act 63

Conclusion 68

Appendix A 69

Appendix B 73

Appendix C 81

CITATIONS

Cases:

Belfi v. *United States*, 259 Fed. 822 53

Berra v. *United States*, 351 U.S. 131 47

Boyle v. *United States*, 259 Fed. 803 53

Crall and Ostrander v. *Commonwealth*, 103 Va. 855 29

Fitzgerald v. *United States*, 6 F. 2d 156 ..... 53, 54

General Motors Corp. v. *United States*, 121 F. 2d 326, certiorari denied, 314 U.S. 618 47

Hartford-Empire Co. v. *United States*, 323 U.S. 386 ..... 61, 62, 63, 64

In re Greene, 52 Fed. 104 ..... 20, 22, 24, 34

Meehan v. *United States*, 11 F. 2d 847 ..... 53, 54

Moore v. *United States*, 85 Fed. 465 17

Nash v. *United States*, 229 U.S. 373 ..... 25, 26

Patterson v. *United States*, 222 Fed. 599 ..... 30, 31, 34

People v. *Clark*, 8 N.Y. Crim. Rep. 179, 14 N.Y. Supp. 642 ..... 14, 29

Cases—Continued

	Page
People v. *Detroit White Lead Works*, 82 Mich. 471	14, 29
People v. *Duke*, 44 N.Y. Supp. 336, 19 Misc. Rep. 292	14, 29
Pharmaceutical Society v. *London & Provincial Supply Ass'n, Ltd.* [1880] 5 Q.B.D. 310	15
Queen v. *The Great North of England Ry.* [1846] 9 Q.B. 315	14
Rex v. *Hayes*, 14 Ont. L.R. 201	14
Rex v. *Medley*, 6 Car. & Payne 292 (K.B. 1834)	14
Rosenberg v. *United States*, 346 U.S. 273	47
Standard Fashion Co. v. *Magrane-Houston Co.*, 258 U.S. 346	35
State v. *Carmean*, 126 Iowa 291	15
State v. *Great Works Milling & Mfg. Co.*, 20 Me. 41	14, 29
State v. *The Morris & E. R. Co.*, 23 N.J. Eq. 360	14
State v. *Ross*, 55 Ore. 450	15
Tyler v. *Savage*, 143 U.S. 79	15
Union Pacific Coal Co. v. *United States*, 173 Fed. 737	24
United States v. *Aileen Coal Co.* (S.D.N.Y., 1917)	50
United States v. *Algoma Coal & Coke Co.* (S.D.N.Y., 1917)	50
United States v. *American Naval Stores, Inc.*, 172 Fed. 455	25
United States v. *American Naval Stores* (C.C.S.D. Ga., 1909), D. & J. 729, reversed on appeal *sub nom.*, *Nash* v. *United States*, 229 U.S. 373	19, 25, 53
United States v. *American Optical Co.*, No. 61 Crim. 82 (E.D. Wisc.) November 1, 1961, notice of appeal to Supreme Court filed December 19, 1961	10
United States v. *American Wringer Co.* (W.D. Pa., 1914), D. & J. 822	18
United States v. *Atlantic Commission Co.*, 45 F. Supp. 187	9, 47, 59, 60, 61, 62
United States v. *The Atlas Portland Cement Co.* (S.D. N.Y., 1921)	51
United States v. *Baker-Whiteley Coal Co.* (S.D.N.Y., 1917)	50
United States v. *Thomas Barton* (W.D. Va., 1917)	50
United States v. *Beacon Brass Co.*, 344 U.S. 43	47
United States v. *Constantine Bilfi* (E.D. Pa., 1917)	50
United States v. *Borden*, 308 U.S. 188	32, 39

Cases—Continued

	Page
United States v. *Michael Boyle* (N.D. Ill., 1915)	49
United States v. *Louis Bregler Co.* (N.D. Ill., 1921)	50
United States v. *Isaac Chapman* (S.D.N.Y., 1915)	49
United States v. *Chicago Mosaic & Tiling Co.* (N.D. Ill., 1917)	50
United States v. *Daniel P. Collins* (Sup. Ct. D.C., 1914), D. & J. 826	18
United States v. *S. H. Cowell* (D. Ore., 1916)	49
United States v. *Dotterweich*, 320 U.S. 277	46
United States v. *William C. Geer* (S.D.N.Y., 1911), D. & J. 758	18
United States v. *General Motors Corporation*, 26 F. Supp. 353, affirmed, 121 F. 2d 376, certiorari denied, 314 U.S. 618	8, 9, 55, 57, 59, 61
United States v. *General Motors Corp.*, No. 30,132 Crim., pending on rehearing	10, 13
United States v. *Gilliland*, 312 U.S. 86	47
United States v. *Gooding*, 12 Wheat, 460	15
United States v. *Joseph B. Greenhut, et al.*, Cr. Nos. 461 and 570	16
United States v. *Greenhut*, 50 Fed. 469	19, 22, 24
United States v. *Hunter Milling Co.* (W.D. Okla., 1911), D. & J. 779	18
United States v. *Imperial Window Glass Co.* (W.D. Pa., 1910), D. & J. 748	18
United States v. *Jensen Creamery Co.* (D. Idaho, 1917)	50
United States v. *E. C. Knight Co.*, 156 U.S. 1	33, 34
United States v. *MacAndrews & Forbes Co.*, 149 Fed. 823	22, 23, 24, 29, 53
United States v. *Mead* (S.D.N.Y., 1917), D. & J. 860	50
United States v. *Milk Distributors Ass'n, Inc.*, Crim. No. 25658 (D. Md., December 29, 1961)	10, 13
United States v. *Mills*, 7 Pet. 138	15
United States v. *Moore*, 7 F. 2d 734	54
United States v. *Moore* (D.C. Ter. Utah, 1895)	17
United States v. *National Dairy Products Corp.*, No. 173, this Term, probable jurisdiction noted, 368 U.S. 808	5
United States v. *National Malleable & Steel Castings Co.*, 6 F. 2d 40	9, 52, 61

Cases—Continued

Page

United States v. *New Departure Mfg. Co.* (W.D.N.Y., 1912), D. & J. 785 18
United States v. *North American Van Lines, Inc.*, Crim. No. 527–61, decided January 29, 1962 ..... 10, 47
United States v. *Packard-Bell Electronics Corp. et al.*, Criminal No. 30158 (S.D. Cal.) 10
United States v. *Palmer et al.* (C.C.S.D.N.Y., 1911), D. & J. 760 18
United States v. *Patterson*, Cr. No. 1215 (C.C. Mass.) 17
United States v. *Patterson*, 55 Fed. 605 21
United States v. *Patterson*, 201 Fed. 697 30
United States v. *Patterson* (S.D. Ohio, 1912), D. & J. 795, reversed on appeal, 222 Fed. 599, certiorari denied, 238 U.S. 635 ..... 19, 29, 53
United States v. *Patterson*, 59 Fed. 280 ..... 20, 30
United States v. *Phoenix Wholesale Meat & Produce Co.* (D. Terr. Ariz., 1907), D. & J. 704 (conviction affirmed, *sub nom. Tribolet* v. *United States*, 95 Pac. 85) 18
United States v. *M. Plowaty & Sons* (D. Mass., 1917) 50
United States v. *Potts*, Criminal 56–157–M (D. Mass.) 51
United States v. *William Rockefeller* (S.D.N.Y., 1914) 49
United States v. *Walter G. St. Clair* (Sup. Ct. D.C., 1917) 50
United States v. *Shotter Co.* (S.D. Ga., 1907), D. & J 707 18
United States v. *Socony-Vacuum Oil Co.*, 23 F. Supp. 937, affirmed, 310 U.S. 150 ..... 62, 63
United States v. *Standard Sanitary Mfg. Co.* (E.D. Mich., 1910) D. & J. 755 18
United States v. *Sumatra Purchasing Corp.* (S.D.N.Y., 1918) 50
United States v. *Swift*, 188 Fed. 92 ..... 26, 27, 28
United States v. *Union Pacific Coal Co.* (D. Utah, 1907), D. & J. 720, reversed on appeal, 173 Fed. 737 ..... 19, 60
United States v. *Vehicular Parking Ltd.*, 54 F. Supp. 828 ..... 58, 59
United States v. *Virginia-Carolina Chemical Co.*, 163 Fed. 66 23
United States v. *Isaac Whiting* (Cr. Nos. 453 and 454, D. Mass., 1911) 18

Cases—Continued

Page

United States v. *Winslow*, 195 Fed. 578, affirmed, 227 U.S. 202 ..... 26, 27, 28, 29

United States v. *Winslow*, 227 U.S. 202 29

United States v. *A. P. Woodson Co.*, 198 F. Supp. 582, appeal pending, C.A.D.C., Nos. 16,750, 16,763, 16,764, 16,765, 16,766, 16,767 ..... 10, 13

United States ex rel. Hughes v. *Gault*, 271 U.S. 142 ..... 9, 53, 54, 55, 56

United States ex rel. McGrath v. *Mathues*, 6 F. 2d 149 ..... 53, 54

Wyandotte, City of v. *Corrigan*, 35 Kan. 21 14

Statutes:

Agricultural Marketing Agreement Act of 1937 32

Clayton Act, 38 Stat. 730, 15 U.S.C. 1 *et seq.*:

Section 2 35

Section 3 ..... 35, 61

Section 7 35

Section 8 35

Section 14 ..... 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 30, 32, 33, 35, 37, 39, 41, 42, 43, 44, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67.

Section 15 58

Merchant Marine Act, 1920, 41 Stat. 1003, Section 30J(b) 46

Revenue Act of 1918, 40 Stat. 1143, Section 1308(d) 46

Robinson-Patman Act, 15 U.S.C. 13a:

Section 3 5

Sherman Act, 26 Stat. 209, as amended, 69 Stat. 282, 15 U.S.C. 1 *et seq.*:

Section 1 ..... 2, 3, 4, 6, 10, 22, 24, 25, 27, 30, 32, 34, 37, 41, 47, 51, 52, 53, 59, 60, 61, 62, 63, 64.

Section 2 ..... 6, 21, 22, 25, 27, 30, 34, 37, 59, 60, 61, 62, 63, 64

Section 3 ..... 6, 10, 15, 34, 41, 62, 63, 64

Section 4 ..... 59, 62, 63

Section 7 11

Section 8 ..... 33, 34

Wilson Tariff Act, 15 U.S.C. 8–10 50

Miscellaneous:

19 Cong. Rec 16

21 Cong. Rec 16, 17

Miscellaneous—Continued

	Page
33 Cong. Rec.	33
47 Cong. Rec.	34
48 Cong. Rec.	34
50 Cong. Rec.	34
51 Cong. Rec. 30, 34, 36, 37, 38, 40, 44, 45, 46,	47, 48
96 Cong. Rec.	65, 66
101 Cong. Rec.	66
Hearings Before the House Committee of the Judiciary (on H.R. 15657) 63d Cong., 2d Sess., Serial 7, Part 6	30
Hearings Before Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary on H.R. 6679, 81st Cong., 2d Sess.	64
Monopolistic and Unfair Trade Practices, Report of House Select Committee on Small Business, 80th Cong., 2d Sess.	64
H.J. Res. 138, 56th Cong., 1st Sess.	34
H.R. 3659, 84th Cong.	65
H.R. 2237, 83d Cong.	65
H.R. 6679, 81st Cong., 2d Sess.	63
H.R. 15657, 63d Cong., 2d Sess.	36
H.R. 10539, 56th Cong., 1st Sess.	33
H.R. 12624, 62d Cong., 1st Sess.	34
H. Rep. No. 70, 84th Cong., 1st Sess.	66, 67
H. Rep. No. 1906, 81st Cong., 2d Sess.	66
H. Rep. No. 627, 63d Cong., 2d Sess.	42
H. Rep. 1506, 56th Cong., 1st Sess.	55
S. Doc. No. 35, 77th Cong., 1st Sess.	64
S. Rep. No. 618, 84th Cong., 1st Sess.	66
S. Rep. No. 698, 63d Cong., 2d Sess.	37, 40, 42
S. 1375, 63d Cong., 1st Sess.	35
S. 3345, 62d Cong., 2d Sess.	35
S. 3445, 50th Cong., 2d Sess.	15
Report of the Attorney General's Committee To Study the Antitrust Laws	66

The jurisdiction of this Court rests on the Criminal Appeals Act, 18 U.S.C. 3731.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 69 Stat. 282, 15 U.S.C. 1, as it appears in the United States Code, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared * * * to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 14 of the Clayton Act, 38 Stat. 736, 15 U.S.C. 24, as it appears in the United States Code, provides:

> Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

QUESTION PRESENTED

Whether a corporate officer may be prosecuted under the Sherman Act for antitrust violations committed in the course of his corporate duties.

STATEMENT

This is a direct appeal from an order of the District Court for the Eastern District of Missouri dismissing, as to a corporate officer, an indictment charging violations of the Sherman Act committed by him in his capacity as an officer. The ground of dismissal was that, since the official was charged solely in his "representative capacity" as a corporate officer, he could be prosecuted only under Section 14 of the Clayton Act, and not under the Sherman Act (R. 39). The relevant facts are as follows:

Counts 11 and 12 of the indictment (filed on September 16, 1959) charged the National Dairy Products Corporation ("National") and appellee Wise, a vice president and director thereof, with conspiring, together with designated co-conspirators and unknown persons, to eliminate price competition in the sale of fluid milk in the Kansas City area, in violation of Section 1 of the Sherman Act. Each of these counts alleged that, during the period covered thereby, Wise had been "actively engaged in the management, direction, and control of the affairs, policies, and acts of National, and has authorized or ordered to be done some or all of the acts alleged * * * to have been done by National" (R. 7, 9).

On January 24, 1961, Wise moved to dismiss counts 11 and 12 as to him on the ground that "they fail to charge him with an offense under Section 1 of

the Sherman Act * * *" (R. 16). At the same time Wise moved for a bill of particulars requiring the government to state whether he was alleged to have participated in the offenses charged against him in those counts "as an individual acting for his own personal account" or "in any capacity other than as a director, officer, or agent who has authorized, ordered or done any of the acts constituting in whole or in part the violations alleged to have been committed" by National (R. 15). In a supporting statement (R. 17–18) Wise alleged that if he was "personally charged with engaging in the illegal conduct * * * solely as an officer, director or agent [of National] who authorized, ordered or did acts" constituting the offenses charged against National, he could not be prosecuted under the Sherman Act, because "Section 1 of the Sherman Act does not impose criminal responsibility upon corporate officials charged only with authorizing, ordering or doing corporate acts constituting a corporate violation. To the contrary, the prosecution of corporate officials for such acts is governed by Section 14 of the Clayton Act, 15 U.S.C. § 24" (*ibid.*).

The district court denied the motion to dismiss, but sustained the motion for a bill of particulars insofar as it requested the foregoing information (R. 22). In response, the United States stated that Wise "is personally charged with actively and directly engaging in the illegal conduct charged in Counts Eleven and Twelve of the indictment," and that, in doing so, he was "acting solely in his capacity as an officer, director or agent who authorized, ordered, or did some of the

acts constituting in whole or in part the violations alleged also to have been committed" by National (R. 34).

Wise then renewed his motion to dismiss on the ground that "said counts, in themselves and as made more specific by [the] Bill of Particulars * * * fail to charge him with an offense under Section 1 of the Sherman Act * * *" (R. 35). The district court on June 14, 1961, granted the motion (R. 37–39) and, on August 10, 1961, entered an order dismissing counts 11 and 12 as to Wise (R. 41–42).[1]

The court held that a corporate officer "charged solely in his representative capacity and not in any degree on an individual basis for his own personal account" may not be prosecuted under Section 1 of the Sherman Act but only under Section 14 of the Clayton Act (R. 39). The court stated (*ibid.*) that prior to the enactment of the Clayton Act in 1914 "confusion and uncertainty existed" as to the criminal responsibility of corporate officers under the Sherman Act, and that Congress in enacting Section 14 "intended to eliminate that uncertainty and confusion." The court concluded (*ibid.*) that "[u]nder clear Congressional interpretations, the Sherman Act governs the prosecution and punishment of principals, i.e., corporations and individuals acting on their own be-

[1] The district court had previously dismissed other counts of the indictment that charged National, and in one count Wise as well, with violating Section 3 of the Robinson-Patman Act, on the ground that that section is unconstitutionally vague. The validity of that holding is now before the Court in *United States* v. *National Dairy Products Corp.*, No. 173, this Term, probable jurisdiction noted, 368 U.S. 808.

half, while Section 14 of the Clayton Act covers the prosecution and punishment of individuals who, as corporate officials, took part in the corporate violation"; that this interpretation is "supported by the wording and legislative history of Section 14"; and that "[a]ny other interpretation would leave Section 14 without content or force."

SUMMARY OF ARGUMENT

The court below held that a corporate officer cannot be prosecuted under the Sherman Act for antitrust violations committed in his representative capacity (as distinguished from such violations committed "on an individual basis for his own personal account," R. 39), but only under Section 14 of the Clayton Act. The language of the Sherman Act, the criminal enforcement practices of the Department of Justice, the consistent course of judicial decision, and the legislative history of the Clayton Act, all compel the contrary conclusion. The ruling below frustrates the clear Congressional intent that Section 14 was to supplement, but not to supersede, the existing liability of corporate officials under the Sherman Act.

I

Sections 1–3 of the Sherman Act make "[e]very person" who violates their substantive provisions guilty of a misdemeanor. On its face, this broad language covers corporate officials. Moreover, when the Sherman Act was passed in 1890, it was settled that corporate officers who actively participated in illegal acts on behalf of their corporations were guilty of a crime, and the imposition of criminal liability

upon "[e]very person" who violated the standards of the Sherman Act embraced the commission of such acts by corporate officials. The applicability of the Sherman Act's criminal provisions to corporate officials is further supported by the fact that, during the period between 1890 and 1914, at least 40 indictments were filed by the government under that Act against corporate officials. Furthermore, Sherman Act indictments against such officials were upheld in a number of cases during that period, in none of which was it suggested that such liability existed only where the corporate official acted on his own behalf rather than for the corporation. The court below was clearly in error in concluding that, when the Clayton Act was enacted in 1914, "much doubt and uncertainty existed" (R. 38) as to the criminal liability of corporate officers under the Sherman Act.

II

The Clayton Act was passed to supplement the existing antitrust provisions of the Sherman Act. Section 14 of the Clayton Act provides that, whenever a corporation violates any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers or agents who shall have "authorized, ordered, or done" any of the acts constituting in whole or in part such violation. The legislative history of this section shows that it was intended to supplement, but not to supersede, the existing criminal liability of corporate officers under the Sherman Act. The sponsors of the legislation repeatedly stressed that the existing penal

provisions of the Sherman Act were not being changed, and that Section 14 was intended to broaden the criminal liability of corporate officials under the Sherman Act. The fact that conduct by corporate officials which would violate the Sherman Act would usually also violate Section 14, affords no basis for construing the latter as providing the sole method for prosecuting such officials. A criminal statute is not repealed by implication merely because a subsequent statute makes the same conduct illegal.

III

The applicability of the Sherman Act to antitrust violations committed by corporate officers is further supported by the enforcement practices of the Department of Justice following the enactment of the Clayton Act. After 1914, the government continued its practice of indicting corporate officials under the Sherman Act, and no challenge was made thereto until 1939, when the practice was upheld. See *United States* v. *General Motors Corp.*, 26 F. Supp. 353 (N.D. Ind.), affirmed, 121 F. 2d 376 (C.A. 7), certiorari denied, 314 U.S. 618. If Section 14 had established the sole procedure for prosecuting corporate officials, one would assume that the government would have proceeded under the new section, or that corporate officials indicted under the Sherman Act would soon have moved to dismiss such indictments.

Prior to the decision below, every case which considered the relationship between the Sherman Act and Section 14 of the Clayton Act concluded that Section

14 did not provide the exclusive method for prosecuting corporate officials, and that they might also be prosecuted under the Sherman Act. See, *e.g.*, *United States* v. *General Motors Corp.*, *supra*; *United States* v. *National Malleable & Steel Castings Co.*, 6 F. 2d 40 (N.D. Ohio); *United States* v. *Atlantic Commission Co.*, 45 F. Supp. 187 (E.D.N.C.); cf. *United States ex rel. Hughes* v. *Gault*, 271 U.S. 142.

Further support for the view that corporate officers are criminally liable under the Sherman Act is found in the action of Congress in 1955 in increasing the maximum fine for violation of the Sherman Act from $5,000 to $50,000, but making no change in the $5,000 fine under Section 14. The legislative history of that change shows that Congress intended to increase the penalties for individuals as well as for corporations, and that it refrained from increasing the fine under Section 14 only because the Department of Justice had advised that such increase was unnecessary insofar as Sherman Act prosecutions were concerned. If Section 14 were the sole method for prosecuting corporate officials, Congress plainly would have increased the penalty thereunder when it increased the Sherman Act penalties.

ARGUMENT

INTRODUCTION

In this case the district court held, for the first time since the Sherman Act was enacted over 70 years ago, that a corporate officer cannot be prosecuted under that Act for violations committed in his

630086—62——2

corporate capacity.[2] According to the district court (R. 39), a corporate official "charged solely in his representative capacity and not in any degree on an individual basis for his own personal account" may be charged only under Section 14 of the Clayton Act. This novel holding is contrary to the language of the statutes, their legislative history, and the consistent course of judicial decision and criminal enforcement of the Sherman Act by the Department of Justice, both before and after the passage of the Clayton Act.

We turn first to the language. Section 1 of the Sherman Act (as amended) provides that "[e]very person" who engages in an illegal conspiracy, combination or contract in restraint of trade is guilty of a misdemeanor and, upon conviction, may be fined up to $50,000, or imprisoned up to one year, or both;

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[2] Since the decision below, four other district courts have reached the same conclusion. *United States* v. *A. P. Woodson Co.*, 198 F. Supp. 582 (D.D.C.), appeal pending, C.A.D.C., Nos. 16,750, 16,763, 16,764, 16,765, 16,766, 16,767; *United States* v. *American Optical Co.*, No. 61 Crim. 82 (E.D. Wisc., November 1, 1961), notice of appeal to this Court filed December 19, 1961; *United States* v. *Milk Distributors Ass'n, Inc.*, Crim. No. 25658 (D. Md., December 29, 1961); *United States* v. *General Motors Corp.*, No. 30,132 Crim. (S.D. Cal., February 12, 1962), notice of appeal to this Court filed February 16, 1962. On the other hand, in *United States* v. *North American Van Lines, Inc.*, Crim. No. 527-61 (D.D.C., January 29, 1962), the district court recently denied a motion to dismiss a Sherman Act indictment against corporate officials, holding that they were properly charged under Sections 1 and 3 of the Sherman Act. See discussion, *infra*, p. 41. And on February 16, 1962 Judge Yankwich without opinion denied a similar motion in *United States* v. *Packard-Bell Electronics Corp. et al.*, Criminal No. 30158 (S.D. Cal.).

and Section 7 of that Act defines "person" to include "corporations" and "associations." On their face, these provisions plainly cover both corporations and their officials. "Every person" obviously includes a corporate official, and if such officials engage in the conduct prohibited by the Act, they are subject to the Act's criminal provisions. There is nothing in the language of Section 1 that supports the district court's theory that, as applied to corporate officials, the word "person" means only an official who acted "on an individual basis for his own personal account," and not one who acted "solely in his representative capacity."

Section 14 of the Clayton Act provides that, whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation "shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered or done any of the acts constituting in whole or in part such violation"; makes such violation a misdemeanor; and imposes a maximum fine of $5,000, or maximum imprisonment of one year, or both. Again, there is nothing in this language which suggests that a corporate official who has violated the Sherman Act while acting in his corporate capacity cannot be prosecuted under that Act. On the contrary, the words of Section 14 at most impose an alternative liability on corporate directors, officers or agents who have advised, ordered or done any acts which constitute, in whole or in part, a violation of the antitrust laws committed by their corporation.

The district court held (R. 39), however, that prior to the enactment of the Clayton Act "confusion and uncertainty existed" as to whether corporate officials were criminally liable under the Sherman Act for acts done in their "representative" capacity; that Congress enacted Section 14 "to eliminate that uncertainty and confusion"; and that both "the wording and legislative history of Section 14" support the view that that section exclusively "covers the prosecution and punishment of individuals who, as corporate officials, took part in the corporate violation."

We shall show that, contrary to the views of the district court, there was no "uncertainty and confusion" prior to the passage of the Clayton Act as to whether corporate officials were criminally liable under the Sherman Act, but that such liability was well established; that the legislative history of the Clayton Act demonstrates that Congress intended Section 14 only to supplement and reinforce, and not to supersede in any way, the already-existing criminal liability of the corporate officials under the Sherman Act; that in the 46 years between the enactment of the Clayton Act and the decision below, the government continued to follow its pre-1914 practice of indicting corporate officials under the Sherman Act; and that during that period the courts repeatedly upheld the propriety of such indictments.

The significance of the issue is not limited to the fact that the maximum fine under the Sherman Act is $50,000, and under the Clayton Act is only $5,000, although the importance of the greater penalty as a

deterrent upon corporate officials should not be minimized. The ruling below poses a number of serious substantive and procedural problems, some of which have already arisen and others of which are certain to develop in the future. For example, it has been held that corporate officials ~~could~~ may no longer be indicted and tried together with their corporations under a single count,[3] but ~~would~~ have to be charged in a separate count under Section 14.[4] Allegations in an indictment previously deemed sufficient under the Sherman Act have been challenged as insufficient to charge a violation of Section 14.[5] There may be difficult problems of trial procedure where corporate officials and their corporations are charged in separate counts under different statutes. The resolution of

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[3] In both the *Woodson* and the *Milk Distributors'* cases (*supra*, note 2), the district courts held that an indictment charging, in the same count, corporations with violation of the Sherman Act and their officers with violation of Section 14 of the Clayton Act, would be duplicitous.

[4] In the *General Motors* case (*supra*, note 2), however, the district court dismissed as duplicitous a separate count charging the individual defendants with violating Section 14, presumably because the allegations of the preceding Sherman Act count were realleged.

[5] In their brief in the court of appeals in the *Woodson* case (*supra*, note 2), the individual defendants have contended (Br. pp. 35–38) that allegations sufficient to charge a corporation (and previously held sufficient to charge corporate officers) with violations of the Sherman Act are insufficient to charge violations of Section 14, since they do not detail the acts the individuals "authorized, ordered or did," and allegedly do not assert that the officers had knowledge of the intent of the conspiracy and the relation of the act to the conspiracy. In the absence of such a showing of intent, it is suggested, Section 14 might be unconstitutional.

these and many other questions that will inevitably arise will necessarily require extensive litigation, and the prompt prosecution of criminal cases, which is plainly necessary for effective antitrust enforcement, would be impeded.

I

PRIOR TO THE ENACTMENT OF THE CLAYTON ACT IN 1914, IT WAS WELL ESTABLISHED THAT CORPORATE OFFICIALS WERE CRIMINALLY LIABLE FOR VIOLATIONS OF THE SHERMAN ACT COMMITTED IN THEIR CORPORATE CAPACITY

Since Congress did not specify the extent to which corporate officials would be criminally liable under the Sherman Act (other than to prescribe that "[e]very person" who did any of the prohibited acts was guilty of a misdemeanor), it obviously intended to apply the normal rules governing the criminal liability of corporate officers. When the Act was passed in 1890, it had long been settled that corporate officials could be criminally prosecuted (with or without their corporations) for criminal corporate activity in which they personally participated.* *State* v. *Great Works Milling and Man. Co.*, 20 Me. 41; *State* v. *The Morris & E.R. Co.*, 23 N.J. Rep. 360, 369; *People* v. *Clark*, 8 N.Y. Crim. Rep. 179, 14 N.Y. Supp. 642; *Rex* v. *Hayes*, 14 Ont. L.R. 201; *Queen* v. *The Great North of England Ry.* [1846], 9 Q.B. 315, 326–327; see *People* v. *Duke*, 44 N.Y. Supp.

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*In a number of early cases the principal corporate officials were held liable, without any showing of actual participation or knowledge, for a nuisance committed by their corporation or where it operated without a license or franchise. See *Rex* v. *Medley*, 6 Car. & Payne 292 (K.B. 1834); *City of Wyandotte* v. *Corrigan*, 35 Kan. 21; *People* v. *Detroit White Lead Works*, 82 Mich. 471.

336, 19 Misc. Rep. 292 (indictment of officers of American Tobacco Company for conspiracy to injure trade and commerce); *State* v. *Carmean*, 126 Iowa 291; *State* v. *Ross*, 55 Ore. 450; cf. *Tyler* v. *Savage*, 143 U.S. 79, 97–98. No distinction was drawn between officials who committed such acts in their "representative" (corporate) capacity and those who acted in their own personal interest.[7] The sole touchstone of liability was whether they had actively participated in the criminal acts of their corporation. Such liability apparently developed from the earlier principle that, in the case of misdemeanors, agents were criminally liable as principals with their superiors for those violations in which they had personally participated. See *United States* v. *Gooding*, 12 Wheat. 460, 471; *United States* v. *Mills*, 7 Pet. 138, 139–141.

In these circumstances, it is not surprising that, almost from the outset of the enforcement of the Sherman Act, the government indicted corporate officials who had participated in corporate violations; and that the propriety of such indictments, under the statute making "[e]very person" who violates its standards criminally liable,[8] was soon judicially established.

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[7] In the latter case, however, the corporation might not be liable. See *Pharmaceutical Society* v. *London & Provincial Supply Ass'n, Ltd.*, *supra*, 5 Q.B.D. at 315.

[8] Although Senator Sherman's original bill as introduced in the 50th Congress on August 14, 1888 (S. 3445, 50th Cong., 2d Sess.) did not include any provision for criminal sanctions, the amended bill as reported from the Finance Committee on September 11, 1888 contained as Section 3 a criminal provision specifying "That all persons entering into any such arrangement, contract, agreement, trust, or combination described in section 1 of this Act, either on his own account or as agent or

A. PRIOR TO 1914, IT WAS THE SETTLED PRACTICE OF THE GOVERNMENT TO INDICT CORPORATE OFFICIALS FOR VIOLATIONS OF THE SHERMAN ACT

We have set forth in Appendix A (*infra*, pp. 69–72) a table listing the numerous cases brought by the government between 1890 and 1914 in which corporate officials were indicted for violation of the Sherman Act. As there shown, the first of those cases were filed in 1892, only two years after the Act was passed. In that year two indictments were filed (*United States* v. *Joseph B. Greenhut, et al.*, Cr. Nos. 461

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attorney for another, or as an officer, agent, or stockholder of any corporation, or as a trustee, committee, or in any capacity whatever, shall be guilty of a high misdemeanor," punishable by a fine of up to $10,000 or imprisonment for not more than five years (19 Cong. Rec. 8483–84).

No action was taken on this bill and a new bill, S. 1, was introduced by Senator Sherman into the 51st Congress on December 4, 1889. This bill contained a criminal section identical with Section 3 of S. 3445. But on February 27, 1890 Senator Sherman informed the Senate (21 Cong. Rec. 1765) that he had been instructed by the Committee on Finance to strike the entire criminal section. (This action is reflected in a committee print of S. 1 of March 18, 1890.) On March 21, 1890, he explained to the Senate that the Finance Committee had deleted the criminal provisions because Sections 1 and 2 were remedial and would be liberally construed if standing alone, whereas the inclusion of a criminal section might lead to a more restricted interpretation of the bill. See 21 Cong. Rec. 2456–2457.

In the meanwhile Senator Reagan had introduced a substitute bill making criminal the creation of a trust by "all persons engaged in the creation of any trust or as owner, or part owner, agent, or manager of any trust * * * or any owner or part owner, agent, or manager of any corporation using its powers * * *" to create the trust. See 21 Cong. Rec. 1772. The Reagan substitute bill was subsequently adopted as an amendment to

and 570 (D. Mass.), *United States* v. *Patterson, et al.*, Cr. No. 1215 (C.C. Mass.)) charging a large number of the officers of the Distilling and Cattle Feeding Co. (the "whiskey trust") and of National Cash Register Co., respectively, with violations of the Sherman Act. Although only one other such case was filed prior to 1900 (*United States* v. *Moore* (D.C. Terr. Utah, 1895)),[9] between 1900 and 1914, 37 criminal

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S. 1 (21 Cong. Rec. 2560–61, 2611). Senator Sherman, who had originally opposed the Reagan bill on the ground that antitrust was a new subject and it was better to declare general principles and leave the question of criminal sanctions for later (21 Cong. Rec. 2562), subsequently changed his position and stated that "[t]he proposition made by the Senator from Texas [Reagan] is also in the right direction, and, after careful consideration of that proposition there can be no objection to it so far as anyone who is in favor of the principle of the bill is concerned," since "[i]t adds a criminal clause and defines somewhat the meaning of the words in the original bill" (21 Cong. Rec. at 2655).

The bill as further amended was subsequently committed to the Committee on the Judiciary, which completely rewrote it and submitted it back to the Senate in the form in which it eventually passed. Senator Hoar, who assumed primary responsibility for the language of the bill as passed, stated that he would not explain it as its meaning was well understood (21 Cong. Rec. 3145). The only other explanation of the new language is contained in the brief statement by Senator Edmunds, chairman of the Judiciary Committee, that "we were trying to strike at great evils in a broad way and leave the details and difficulties that might afterwards arise to be repaired by legislation" (21 Cong. Rec. at 3148).

[9] In that case a number of coal dealers, including two Salt Lake City agents of coal mining corporations, were indicted. The defendants were convicted and corporate agent Moore was fined $200.00. The convictions were reversed on the ground that the court had lost jurisdiction when Utah became a state in 1896. See *Moore* v. *United States*, 85 Fed. 465 (C.A. 8).

actions under the Sherman Act were brought against corporate officials, in 27 of which both a corporation and one or more of its officers, directors or agents were indicted.

Most of the corporate officials indicted were the directors and/or the principal officers (President, Vice President, Secretary, Treasurer or General Manager), but in at least 14 cases lesser officials or agents were also charged. In no case was a corporate official indicted for actions other than those taken in his "representative capacity", *i.e.,* in the performance of actions within the scope of his corporate functions for the corporate benefit.

In at least eight cases prior to 1914[10] corporate officials pleaded guilty or *nolo contendere* and were fined; in three others[11] they were convicted after trial

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[10] The judgments in these various cases are printed in Decrees and Judgments in Federal Anti-Trust Cases ("D. & J."), published by the Government Printing Office, 1918. *United States* v. *Shotter Co.* (S.D. Ga. 1907), D. & J. 707, 708; *United States* v. *Imperial Window Glass Co.* (W.D. Pa. 1910), D. & J. 748; *United States* v. *William C. Geer* (S.D.N.Y., 1911), D. & J. 758; *United States* v. *Isaac Whiting* (Cr. Nos. 453 and 454, D. Mass., 1911); *United States* v. *Palmer et al.* (9 related indictments in "wire pool" cases) (C.C.S.D.N.Y., 1911), D. & J. 760–775; *United States* v. *New Departure Mfg. Co.* (W.D.N.Y., 1912), D. & J. 785; *United States* v. *American Wringer Co.* (W.D. Pa., 1914), D. & J. 822; *United States* v. *Daniel P. Collins* (Sup. Ct. D.C., 1914), D. & J. 826–827.

[11] *United States* v. *Phoenix Wholesale Meat & Produce Co.* (D. Terr. Ariz., 1906), D. & J. 704–705 (conviction affirmed, *sub nom. Tribolet* v. *United States*, 95 Pac. 85); *United States* v. *Standard Sanitary Mfg. Co.* (E.D. Mich., 1910) D. & J. 755; *United States* v. *Hunter Milling Co.* (W.D. Okla., 1911), D. & J. 779.

and fined; and in three cases[12] they were convicted and the convictions were reversed on appeal, but not because the defendants were corporate officers.

B. THE JUDICIAL DECISIONS PRIOR TO 1914 CAST NO DOUBT UPON, BUT ON THE CONTRARY RECOGNIZED, THE CRIMINAL LIABILITY OF CORPORATE OFFICIALS FOR SHERMAN ACT VIOLATIONS COMMITTED IN THEIR CORPORATE CAPACITY

In considering whether corporate officials might be prosecuted under the Sherman Act for acts committed in their corporate capacity, the courts from the outset of Sherman Act enforcement applied the settled rule that corporate officials are criminally liable for illegal corporate activity in which they participate (see *supra*, pp. 14–15). None of the cases which involved the issue cast any doubt upon the liability of such corporate officials, and in several of them such liability was expressly recognized. We shall discuss the cases chronologically, since we believe that such a presentation will be helpful to the Court in ascertaining the state of the law on this subject when the Clayton Act was before Congress in 1914.

1. The first two cases involved the unsuccessful prosecution of the "whiskey trust," but neither of them directly ruled on the point. In *United States* v. *Greenhut*, 50 Fed. 469 (D. Mass., 1892), the court,

[12] *United States* v. *Union Pacific Coal Co.* (D. Utah, 1907), D. & J. 720, reversed on appeal, 173 Fed. 737 (C.A. 8), see p. 24, *infra; United States* v. *American Naval Stores* (C.C.S.D. Ga., 1908), D. & J. 729, reversed on appeal *sub nom.*, *Nash* v. *United States*, 229 U.S. 373, see p. 25, *infra; United States* v. *Patterson* (S.D. Ohio, 1912), D. & J. 795, reversed on appeal, 222 Fed. 599 (C.A. 6), certiorari denied, 238 U.S. 635, see p. 29, *infra*.

in sustaining a demurrer to the indictment on the ground that it failed to charge an offense under the Sherman Act, stated (p. 471):

> Other questions presented under this indictment were argued by counsel, and among them the important questions * * * whether the things charged against the defendants were not rather the doings of the corporation than of its officers. In regard to these questions it is only necessary to remark that * * * they should not be decided finally against the government by the trial court * * *.

In *In re Greene,* 52 Fed. 104 (C.C. Ohio, 1892), a removal case involving the same indictment, the court explained that the issue of the liability of the corporate officials arose because the indictment failed to charge all but one of them with personal participation in the offense. The court did not suggest, however, that there would be any question as to their liability if they had been charged with actual participation in the illegal corporate acts. It stated (p. 119):

> All the acts and matters charged as criminal offenses were, as shown upon the face of the indictment, the acts of the Distilling & Cattle Feeding Company, a corporation organized under the laws of Illinois. It is not alleged what relation the accused bore to said corporation; nor does it appear whether their connection therewith was other than that of mere stockholders, except as to the defendant Greenhut. * * * If the acts charged constitute criminal offenses, the Distilling & Cattle Feeding Company is the "person" who has committed the same. It would be unheard of in

> criminal jurisprudence to make its stockholders criminally responsible for the corporation's violation of the statute. That corporation can readily be reached and prosecuted by the government, either civilly or criminally, for what it may have done in contravention of the law, without requiring the courts, by strained construction of the statute, to extend its provisions and make them embrace all parties merely interested in such corporation. Except in conspiracy offenses, there is no criminality by representation.

2. The first case in which a court specifically rejected the contention that corporate officials were not criminally liable for acts committed in their corporate capacities was *United States* v. *Patterson,* 59 Fed. 280 (C.C. Mass., 1893). The indictment in that case charged a number of officials of the National Cash Register Company with monopolization, in violation of Section 2 of the Sherman Act. A demurrer was filed, alleging, among other things, that the indictment was defective because the corporation had not been named as a defendant, and the individual defendants were alleged to have acted solely for the benefit of the corporation rather than for themselves (see the summary of defendants' argument in *United States* v. *Patterson,* 55 Fed. 605, 636–637 (C.C. Mass., 1893)). The district court, in rejecting this contention, stated (pp. 283–284):

> * * * neither the letter of the statute nor the philosophy of pleading conspiracies require that it should appear that the purpose was to engross, monopolize, or grasp into the hands of one of the persons indicted, or that the defend-

> ants were interested in behalf of the party for whose benefit they combined to monopolize, engross, or grasp, or, indeed, what their relations were to that party.

3. The leading case of *United States* v. *MacAndrews & Forbes Co.*, 149 Fed. 823 (C.C.S.D.N.Y., 1906), similarly recognized the criminal liability of corporate officers under the Sherman Act. In that case the indictment charged two corporations and their respective presidents with violations of Sections 1 and 2 of the Sherman Act; it alleged that the individuals "in their capacity as such officers, and on behalf and by authority of those corporations respectively, during the period of time in this indictment * * * did carry on the business aforesaid." (Record on Appeal in Nos. 209, 210, O.T., 1908, p. 6.) Demurrers were separately filed to the indictment by both the corporate and individual defendants, the former asserting that the acts were solely those of the individual defendants, the latter that the corporations alone were liable.

The district court rejected the defenses. Distinguishing the *Greenhut* and *Greene* cases, *supra*, as showing only "that courts have conclusively presumed that the relation between a corporation and its stockholder is not such that the latter can be held to criminal responsibility *for a violation of the law in which he is not alleged to have personally participated*" (149 Fed. at 832, emphasis added), the court ruled (*ibid.*, emphasis added):

> It is not without significance that offenses as serious, in congressional opinion, as those created by this statute are made misdemeanors.

> When the statute declares that certain acts notoriously to be accomplished under modern business conditions only through corporate instrumentality shall be misdemeanors, and further declares that the word "person" as used therein shall be deemed to include corporations, such statute seems to me clearly passed in contemplation of the elementary principle that in respect of a misdemeanor all those who personally aid or abet in its commission are indictable as principals. This is learnedly and fully treated by Van Brunt, J., in *People* v. *Clark* (O. & T.) 14 N.Y. Supp. 642, and I am compelled to the conclusion that, *under this statute, if the officer or agent of a corporation charged with fault be also charged with personal participation, direction, or activity therein, both may be so charged in the same indictment.*[13]

The reliance by the district court below on the *MacAndrews* case as showing the existence of "much doubt and uncertainty" (R. 38) as to the criminal liability of corporate officers under the Sherman Act is clearly misplaced. The court in *MacAndrews* expressed no such "doubt and uncertainty"; on the contrary, it ruled that, if the officer had personally participated in the violation, he could be charged together with the corporation. Nor did the court, in referring to the

[13] The Department of Justice files show that a similar contention that officers could not be indicted together with their companies was made in the contemporaneous case of *United States* v. *Virginia-Carolina Chemical Co.*, 163 Fed. 66, 70 (C.C.M.D. Tenn., 1908). The district court, in rejecting a demurrer, merely stated that "the indictment charges the defendants, in language both apt and with certainty of meaning, with acts denounced by statute as crimes."

officer's "personal participation," intend to draw any distinction between corporate officers acting in their "representative" and in their "individual" capacities (R. 39). As shown by the court's differentiation of the *Greenhut* and *Greene* cases, the court was merely pointing out that, unlike the individual defendants in those cases, the officers in the *MacAndrews* case were not being charged merely because their corporation had committed the alleged offenses, but because of their own active, and hence personal, participation in such offenses—as the indictment alleged.

The criminal liability of corporate officers under the Sherman Act was again recognized three years later in *Union Pacific Coal Co.* v. *United States*, 173 Fed. 737 (C.A. 8, 1909). In that case a coal company, two railroad corporations, the general western agent of the coal company and the superintendent of the rail carriers' business in Utah had been convicted and fined for violation of Section 1 of the Sherman Act (see D. & J. 720). The court of appeals reversed. The court first stated the general proposition that a corporation "is another and different person from any of its stockholders, * * * and no corporation can, by violating a law, make any of its stockholders *who does not himself participate in that violation* criminally liable therefor." (173 Fed. at 739, emphasis added.) It concluded, however, that the evidence did not support the charge against the railroad companies and their agent, and that the coal company could not be guilty of combining with its own agent in violation of the law. In reaching this latter conclusion the court rejected the government's argument that a single cor-

porate agent by his own act can be said to "combine" with his corporation "without the knowledge or participation of any other agent or officer of the corporation" (*id.* at 745), and held that "[t]he union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination" (*ibid.*). The court referred to the ruling in *MacAndrews* that corporate officials may be indicted under the Sherman Act where they have actively participated in the corporations' violation; it rejected the government's view, however, that *MacAndrews* also stood for the proposition that an illegal combination under the Sherman Act could be composed of a corporation and one of its officers.

In *United States* v. *American Naval Stores Co.*, 172 Fed. 455 (S.D. Ga., 1909), a district court again recognized that corporate officers could properly be convicted under the Sherman Act. The indictment charged two corporations, the five chief officers of one corporation and the general manager of the other with violating Sections 1 and 2 of the Act. In its charge to the jury, the court assumed that the individual defendants could be convicted if they had committed the acts charged against them; the principal subject which the court explained was the basis on which the corporation might also be liable for the acts of its agents (172 Fed. at 463–464). The jury convicted five of the six individual defendants but failed to enter any verdict as to the two corporations. See *Nash* v. *United States*, 229 U.S. 373. In an appeal by the convicted defendants, "[i]t was argued with a good deal of force that the only evidence of the alleged con-

spiracy was certain acts done on behalf of the corporations; that the only ground for charging the defendants who were found guilty was their relation to the companies and their being presumably cognizant of and more or less responsible for the corporate acts; that if those acts tended to prove a conspiracy they proved that the corporations more clearly than any one else were parties to it, and therefore that a verdict that was silent as to them ought to be set aside" (229 U.S. at 379). But this Court found it unnecessary to consider "whether on the evidence it was possible to find the defendants guilty by reason of an intent not shown to be shared by the corporations" (*ibid.*), since it held that the judgment in any event had to be reversed because of a faulty charge.

The court below cited (R. 38) this Court's decision in *Nash* as another case indicating confusion and doubt prior to 1914 as to the criminal liability of corporate officials under the Sherman Act. There is nothing in the decision, however, which even remotely suggests that corporations and their officials may not be jointly liable for the acts of the latter, or that such officials could be liable with their corporations only when they are acting on their own behalf, as distinguished from action on behalf of the corporation.

4. The contention that corporate officials could not properly be charged with responsibility for the illegal acts of their corporations was expressly rejected in *United States* v. *Swift,* 188 Fed. 92, 98 (N.D. Ill., 1911) and in *United States* v. *Winslow,* 195 Fed. 578 (D. Mass., 1912), affirmed, 227 U.S. 202. In both of those cases officials of various corporations (but not the

corporations) were charged with illegal combinations in restraint of trade and with monopolization. In the *Swift* case, involving charges against ten principal officers of three major meat packers, the defendants contended that the indictment "fail[s] to charge properly the defendants with responsibility for the acts done; that it appears that the defendants were officers of corporations, and that they could not be liable for corporate doings unless it appeared clearly that they knew of, connived at and directed the things done" (188 Fed. at 98). The court summarily rejected this argument. It stated (*ibid.*):

> * * * The answer to this is found in the indictment, which charges, not that the corporations, but that the groups of individual defendants, did what was alleged to be unlawful; and further, that the defendants managed and controlled the various corporations, and directed the corporate action. More was not necessary.

In the *Winslow* case, six individual officers of corporations which had joined to form the United Shoe Machinery Corporation were charged in separate indictments with violation of Sections 1 and 2 of the Sherman Act. In a demurrer they asserted that they were only officers and directors of their respective corporations and as such could not be charged under the Sherman Act (see Record on Appeal in No. 620, O.T., 1912, p. 50). The district court rejected the contention, stating (195 Fed. at 581–582):

> * * * It is objected that the respondents are joined as officers of various corporations around which this litigation gathers, that one

> corporation is the principal, and that the respondents are only officers or directors thereof. The indictment, however, expressly charges them as actors, and two fundamental principles are thoroughly settled. One is that neither in the civil nor the criminal law can an officer protect himself behind a corporation where he is the actual, present, and efficient actor; and the second is that all parties active in promoting a misdemeanor, whether agents or not, are principals. The rule distinguishing between directors of a corporation who are simply charged as such and directors acting an immediate, special part in the proceedings in question, was pointed out and settled by the Circuit Court of Appeals for this circuit in National Cash Register Company v. Leland, 94 Fed. 502, 508, 509, 37 C.C.A. 372. Although that was a civil suit for damages on account of an infringement of a patent right, the principles apply here as well as there.

Appellee attempts (Motion to Affirm, pp. 12–13) to distinguish the *Swift* and *Winslow* cases on the ground that the corporate officers involved were the leading if not the majority stockholders of their respective corporations, and that their activities involved utilizing "the corporate form as a cover to further their own personal interests." But the ground on which the defendants in both cases demurred to the indictment was that, since they were charged solely because of their acts as corporate officers, they had not violated the Sherman Act. The decisions of the district courts upholding the indictments similarly made no distinction between corporate officials

acting on their own behalf and those acting in a representative capacity.[14]

5. Finally, the litigation arising out of the 1912 indictment in *United States* v. *Patterson* (S.D. Ohio) is of particular importance in assessing the state of the law when the Clayton Act was under consideration. In that case 30 individuals, all officers and agents of the National Cash Register Company, were

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[14] In his motion to affirm, the appellee also relied on a summary of the Solicitor General's argument in an appeal subsequently taken to this Court from the dismissal of the indictment in one of the two *Winslow* cases. See *United States* v. *Winslow*, 227 U.S. 202. This summary (*id.* at 204) cites the Solicitor General as arguing that "individuals are subject to indictment for acts done under the guise of a corporation where the individuals personally so dominate and control the corporation as to immediately direct its action". In fact, what the Solicitor General argued in his brief is that "[i]t is well settled that individuals are criminally liable and subject to indictment for acts done in corporate form where the individuals themselves personally do or procure to be done such things; and it is no objection to the indictment that it alleges that the defendants did the acts complained of in the name of and through the instrumentality of a corporation" (Brief for the United States in No. 620, O.T., 1912, p. 12). The cases which the government cited in support of this proposition (and which are similarly cited by the reporter in the headnote to this Court's decision) include the *MacAndrews & Forbes* case, where, as noted above, the indictment expressly stated that the corporate officials were being charged because of activities undertaken "in their capacities as such officers and on behalf or by authority of those corporations." They also include a number of state cases (*Crall and Ostrander* v. *Commonwealth*, 103 Va. 855, 859–60; *People* v. *Clark*, *supra*; *People* v. *White Lead Works*, *supra*; *People* v. *Duke*, 44 N.Y. Supp. 336, 337–39; *State* v. *Great Works Milling & Man. Co.*, 20 Me. 41) which clearly enunciate the proposition that any corporate officers may be indicted with their corporations wherever they actively participate in the corporate offense.

indicted for violating Sections 1 and 2 of the Sherman Act. These individuals included not only the major corporate officials but 6 district managers, 12 managers of branch offices, 3 agents, one attorney and one law clerk. In overruling a demurrer to the indictment in June 1912 (*United States* v. *Patterson,* 210 Fed. 697, 725–726), the court rejected the argument that only the corporation, and not the individual defendants, could commit the crimes. The court relied on the fact that the indictment charged that the defendants were the persons who controlled and directed the affairs of the company. Twenty-eight of the defendants were convicted, and on February 17, 1913, all were sentenced to jail and the president, Patterson, was also fined $5,000 (D. & J. 795).

Although these convictions were subsequently reversed upon appeal (see *Patterson* v. *United States,* 222 Fed. 599 (C.A. 6)), this reversal did not occur until March 13, 1915, after the passage of the Clayton Act. When the Act was under consideration by the Congress, that body was well aware that Patterson and the other managers and subordinate officers of the Cash Register Company had been sentenced to jail under the Sherman Act. See, *e.g.,* 51 Cong. Rec. 14325; see also Hearings Before the House Committee on the Judiciary (on H.R. 15657), 63d Cong., 2d Sess. (Serial 7, Part 6), pp. 271, 273.

Moreover, despite the recent passage of Section 14, the court of appeals had no doubt as to the liability of the corporate officials under the Sherman Act. The court held that Section 2 of the Sherman Act "includes conspiracies * * * between the officers and

agents of a competitor on its behalf against a competitor" (222 Fed. at 618); and also that the evidence would have supported the conviction of the corporate officials for restraint of trade, since the evidence showed they had all actively participated in the conspiracy (*id.* at 631–633). The grounds of reversal were that evidence had been erroneously excluded and that the charge to the jury was improper (*id.* at 648–650).

In sum, none of the reported decisions prior to 1914 had cast any doubt upon the liability of corporate officials for Sherman Act violations committed in their representative capacity. On the contrary, such liability was well established when Congress considered the Clayton Act, as is shown both by the enforcement practices of the Department of Justice and by the numerous cases which had expressly recognized it.

II

THE LEGISLATIVE HISTORY OF THE CLAYTON ACT SHOWS THAT CONGRESS INTENDED SECTION 14 OF THE CLAYTON ACT TO SUPPLEMENT, BUT NOT TO SUPERSEDE OR LIMIT, THE EXISTING LIABILITY OF CORPORATE OFFICIALS UNDER THE SHERMAN ACT FOR ANTITRUST VIOLATIONS COMMITTED IN THEIR CORPORATE CAPACITIES

As we have shown in Point I, the broad language of the Sherman Act plainly covers corporate officials acting in their representative capacity; and, prior to 1914, the Act had been consistently viewed as reaching such conduct, both by the many courts that had considered the question and by the Department of Justice in its criminal enforcement of the statute.

The critical question in this case, therefore, is whether liability under the Sherman Act was superseded by the enactment of Section 14 of the Clayton Act. The legislative history of the Clayton Act shows that it plainly was not superseded.

A. We start with the "cardinal principle of construction that repeals by implication are not favored." *United States* v. *Borden,* 308 U.S. 188, 198–199. In reversing a lower court ruling that the criminal provisions of the Agricultural Marketing Agreement Act of 1937 had superseded the criminal provisions of Section 1 of the Sherman Act, this Court stated (*ibid.*):

> When there are two acts upon the same subject, the rule is to give effect to both if possible. *United States* v. *Tynen,* 11 Wall. 88, 92; *Henderson's Tobacco,* 11 Wall. 652, 657; *General Motors Acceptance Corp.* v. *United States,* 286 U.S. 49, 61, 62. The intention of the legislature to repeal "must be clear and manifest." *Red Rock* v. *Henry,* 106 U.S. 596, 601, 602. It is not sufficient, as was said by Mr. Justice Story in *Wood* v. *United States,* 16 Pet. 342, 362, 363, "to establish that subsequent laws cover some or even all of the cases provided for by the [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy." See, also, *Posados* v. *National City Bank,* 296 U.S. 497, 504.

The critical inquiry thus is not whether Section 14 of the Clayton Act covers some conduct by corporate officers which would also violate the Sherman Act (as it admittedly does), or whether Section 14 was intended to minimize the effect of alleged "uncertainty and confusion" (R. 39) as to the extent to which corporate officials were liable under the Sherman Act, by supplementary liability under that Act. For the decision of the district court could stand only if it were clearly shown that Congress, in adopting Section 14, had a "clear and manifest" intent to repeal Sherman Act liability. No such showing has, or can, be made; on the contrary, Congress in 1914 was well aware of the Sherman Act liability of corporate officers and had no intention to repeal or limit it.

1. Although it was settled in 1914 that corporate officers were criminally liable under the Sherman Act for violations in which they had actively participated in performing their corporate duties (see Point I, *supra*),[15] the attempts to enforce such criminal liability

[15] In 1900, at a time when antitrust enforcement had reached a virtual standstill as a result of this Court's decision in *United States* v. *E. C. Knight*, 156 U.S. 1, and the three attempts to prosecute corporate officers had been unsuccessful (see pp. 16–17, *supra*), the House, but not the Senate, passed a general revision of the Sherman Act (H.R. 10539, 56th Cong., 1st Sess.). This revision proposed, *inter alia*, to amend Section 8 to include "agents, officers, and attorneys" of corporations and associations within the definition of the word "person." The sponsors of the legislation indicated that in the absence of such a definition the action of such corporate officials "as such agents, officers, and attorneys did not subject them to any penalties under the law * * *" (H. Rep. No. 1506, 56th Cong., 1st Sess., p. 2; see also 33 Cong. Rec. 6477). It is arguable that this statement referred merely to the admitted lack

had been unsatisfactory. Most of the corporate officials indicted under the Sherman Act had not been convicted. Few of those who had been convicted had been fined more than a nominal amount; none had gone to jail, although the defendants in the *Patterson* case (*supra,* p. 30) had been given jail sentences. The members of Congress who were strong supporters of the antitrust laws were of the view that there would be no adequate enforcement of those laws until more severe punishments were imposed on corporate officials, since the fines imposed on large corporations were treated as a minor expense of doing business in a profitable, albeit illegal, manner. See, *e.g.,* 47 Cong. Rec. 3218, 3535–3536; 48 Cong. Rec. 10554, 50 Cong. Rec. 3219–3220; 51 Cong. Rec. 1978 (President Wilson's Antitrust Message to Congress).

Commencing in 1911 a number of bills, none of which was passed, were introduced to extend the liability of corporate officers. See H.R. 12624, 62d Cong., 1st Sess. (amending Sections 1–3 of the Sherman Act to provide that conviction of any corporation or corporate officer "shall constitute a presumption as to the equal guilt of the president and other executive officer or officers, and of each member of the Board

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of criminal responsibility of such officials for corporate actions subject to their general supervision but in which they had not actually participated. See *In re Greene, supra.* But assuming that the House in 1900 mistakenly believed that an amendment to Section 8 of the Sherman Act was necessary to make corporate officials liable for their own acts, this no more establishes the intent of Congress in 1914 than the fact that the House in 1900 believed that a constitutional amendment was necessary to obviate the problems presented by the *Knight* case. See H.J. Res. 138, 56th Cong., 1st Sess.

of Directors and Executive Committee, and the members of any Board or Committee * * * having the control or management of the affairs of such corporation"); S. 3345, 62d Cong., 2d Sess. ("any person * * * entering into any such contract or engaging in any such combination or conspiracy * * * whether acting individually or as a member of a partnership or director, officer or agent of a corporation shall be punished by imprisonment not exceeding one year * * *"); S. 1375 (63d Cong., 1st Sess. (same provisions as S. 3345)). Section 14 of the Clayton Act was the culmination of these efforts.

2. "The Clayton Act, as its title [16] and the history of its enactment disclose, was intended to supplement the purpose and effect of other anti-trust legislation, principally the Sherman Act of 1890" (*Standard Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 355). The substantive provisions of the antitrust laws were strengthened by Sections 2, 3, 7 and 8 of the Clayton Act, which respectively prohibited certain discriminations in price, exclusive dealing and tying contracts, stock acquisitions and interlocking directorates. Section 14 was designed to strengthen antitrust enforcement by insuring the criminal liability of corporate officials resposible for antitrust violations. It provided that a corporation's violation of any of the penal provisions of the antitrust laws "shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized,

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[16] "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes." 38 Stat. 730.

ordered, or done any of the acts constituting in whole or part such violation."

The basic outline of Congressional consideration of Section 14 can be briefly summarized. The original bill introduced by Representative Clayton contained a section which provided that a corporation's guilt under the antitrust laws should be deemed to be that of the officers, directors and agents who had "authorized, ordered or done any of such prohibited acts" (Section 12, H.R. 15657, 63d Cong., 2d Sess.). During the debates, the House adopted an amendment by Representative Lenroot, which made it clear that a corporation would not have to be convicted prior to conviction of its officials (51 Cong. Rec. 9681–82). The House rejected a proposed amendment by Representative Volstead to substitute a provision that any person "who shall do, or cause to be done, or shall willingly suffer or permit to be done" any act prohibited by the antitrust laws, or aid and abet the violation, would himself be guilty of the violation (51 Cong. Rec. 9678).[17] After the House had passed the bill (51 Cong. Rec. 9911), the Senate substituted a provision which limited the coverage of the section to the "penal" provisions of the antitrust laws, and which would have "deemed" the directors, officers or agents of corporations violating the antitrust laws guilty of

[17] Representative Floyd opposed the Volstead amendment as "too drastic" and because it "goes too far" (51 Cong. Rec. 9676). Under the Volstead language making corporate officers liable who "willingly suffer or permit to be done" prohibited acts, acquiescence would have been enough to impose criminal liability. Under the provision adopted, positive action of some kind was required.

a misdemeanor where they had "aided, abetted, counseled, commanded, induced or procured such violation." See S. Rep. 698, 63d Cong., 2d Sess., p. 74; 51 Cong. Rec. 14329. The Conference Committee adopted the House provision, except that it retained the Senate's limitation of the section to violations of the "penal" provisions of the antitrust laws. 51 Cong. Rec. 15640.

3. While none of the many Congressmen who spoke on the subject during the lengthy debates disagreed with the objective of what subsequently became Section 14, and, with one possible exception,[18] all recog-

[18] In the course of the Senate debates with respect to the amendment proposed by the Judiciary Committee to limit the section to "penal" provisions of the antitrust laws, Senator Kenyon observed that "the penal provisions of the Sherman Act, Sections 1 and 2, carry a penalty within themselves and are complete within themselves, and this section would add nothing to that." (51 Cong. Rec. 14325.) Senator Culberson, in charge of the bill for the Judiciary Committee, responded: "The Sherman Act provides the penalty where the corporation acts, and it is against the corporations. This provision penalizes the individuals who act for the corporation and is, as it has been very often termed, the personal guilt portion of the bill" (*ibid.*) This statement was immediately challenged by Senator Kenyon, who asked: "The Senator does not claim that section 1 of the Sherman Act does not penalize the individual?" Senator Culberson responded:

"What I mean to say is this: Heretofore, under the Sherman Act, if a corporation were guilty of a violation of that act, the guilt of that corporation would not be *visited* upon the individual director or agent or officer who authorized or committed or induced the act. This section is intended to supply that deficiency and to visit upon the officers and agents of the corporation responsible for the conduct punishment for the act of the corporation." (*Ibid.*, emphasis added.)

We interpret this subsequent explanation by Senator Culberson as indicating that he was aware of the liability of corpo-

nized the existing Sherman Act liability of corporate officers actively participating in an offense,[19] there was considerable disagreement as to whether the provision would achieve its objectives. Much of the opposition to the proposal stemmed from the fact that the section, as originally drafted (and as subsequently sought to be amended by the sponsoring committee), was subject to the construction that before a corporate officer could be convicted, or even charged, there would have to be a *prior* conviction of the corporation. See *e.g.*, 51 Cong. Rec. 9679–81. In addition, a number of Congressmen, led by Representatives Volstead and Nelson, opposed the provision because they believed that framing the standard for criminal liability in

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rate officials under the Sherman Act and was stressing instead that the new provision went beyond this liability to "visit" upon responsible corporate officials "punishment for the act of the corporation" as contrasted with punishment for their own acts. In any event, Senator Culberson was the only member of Congress whose statement can be read as expressing doubt as to the existing liability of corporate officials under the Sherman Act.

[19] See statement of Representatives Volstead (51 Cong. Rec. 9079, 16203); Nelson (51 Cong. Rec. 9169); Green (51 Cong. Rec. 9201, 9596); Campbell (51 Cong. Rec. 9201); Towner (51 Cong. Rec. 9202); Floyd (51 Cong. Rec. 9608, 9679, 16317, 16320); Barkley (51 Cong. Rec. 9681); Webb (51 Cong. Rec. 16275); Lenroot (51 Cong. Rec. 9681); and Senator Shields (51 Cong. Rec. 14214); Reed (51 Cong. Rec. 14226); Clapp (51 Cong. Rec. 14324); Kenyon (51 Cong. Rec. 14324, 14325); Cummins (51 Cong. Rec. 14328); Walsh (51 Cong. Rec. 16143). The existing liability of corporate officers had also been expressly brought to the attention of the House Judiciary Committee during the hearings on the Clayton Bill by Mr. Levy, one of the government prosecutors in the *MacAndrews & Forbes* case. See Hearings Before the House Committee of the Judiciary (on H.R. 15657), 63d Cong., 2d Sess., Serial 7, Part 6, pp. 270–71.

terms of whether the officials had "authorized, ordered, or done" the acts constituting the corporate violation imposed a less stringent standard than, and hence represented a retreat from, the general aiding and abetting statute which had been passed in 1909.

In the discussions between these various opponents and Representative Floyd, who was the spokesman for the Committee majority (and to a somewhat lesser extent, in the statements of Representatives Barkley, Webb and Lenroot), the intent and meaning of the section as adopted was elucidated. These discussions revealed that the provision sought to go beyond the then-existing Sherman Act liability of corporate officials who actively participated in their corporation's offense, and to make all corporate officials liable for a corporate violation whenever they were involved in the violation. At the same time, in response to the expressed concern that the new language might be restrictively interpreted, the advocates of the provision made clear that the existing Sherman Act liability of corporate officers was to remain in effect, and that resort to Section 14 would be unnecessary where the Sherman Act had been violated.

We have set out the pertinent portions of these statements and colloquies in Appendix B, *infra*, pp. 73–80. The views of the sponsors of the provision are well summarized in Representative Floyd's final statement, during the debate on the Conference Report, that—

> * * * under the Sherman law as it is now written you can convict an officer for violation of its provisions, but his acts must constitute the whole offense, or he must be a conspirator,

> and come within the rules of law governing conspiracies, but under this provision if he does any of the acts which constitute in whole or in part that violation then he may be convicted as an individual. [51 Cong. Rec. 16320]

This statement does not stand alone. Representative Floyd had previously stated that "[u]nder the existing law * * * the person who did the things would undoubtedly be guilty" (51 Cong. Rec. 9609; see *id.*, 9676); that "if the individual independently had violated the Sherman Act and was guilty of violation of it in any way as an individual, he could be convicted without ever convicting the corporation" (*id.*, 9678); that the new section "in no way affects the procedure under existing law, either criminal or civil. If an individual is guilty of violating the Sherman law he can be indicted independently of this provision" (*id.*, 9679); and that

> * * * we have not disturbed the text of the Sherman law. *We have not disturbed the penal provisions in the existing antitrust laws, including the Sherman law. We have, on the contrary, supplemented the penal provisions of the Sherman law* * * *. [*Id.*, 16317, emphasis added.]

The Senate Committee report on the bill similarly pointed out (S. Rep. No. 698, 63d Cong., 2d Sess., p. 1):

> * * * It is not proposed by the bill or amendments to alter, amend, or change in any respect the original Sherman Antitrust Act of July 2, 1890. The purpose is only to supplement that act and the other antitrust acts referred to in section 1 of the bill.

The legislative history of Section 14 was recently described by Judge Matthews of the District Court for the District of Columbia as making it "abundantly clear, however, that Congress did not intend by this section to supplant the penal provisions of the Sherman Act, or to relieve from liability any violators of such provisions" (*United States* v. *North American Van Lines, Inc.*, D.D.C., Cr. No. 527–61, memorandum opinion of January 29, 1962).[20] In denying a motion by corporate officers to dismiss, as to them, an indictment charging them and their corporations with violating Sections 1 and 3 of the Sherman Act, Judge Matthews concluded that "certainly no reasonable basis can be found in the legislative history for the contention that by Section 14 Congress intended or desired to limit in any way the application of any part of the Sherman Act. To the contrary, this history makes it plain that it was the purpose of Congress to maintain all the penal provisions of the Sherman Act in undiminished force" (App. C, *infra,* p. 88).

B. None of the grounds upon which appellee attempts to refute this legislative history is valid.

1. Appellee argues (Motion to Affirm, pp. 15–16) that the following statements in the committee reports show that Section 14 was intended "to establish and to govern the liability of corporate officials":

> Section 12 [which became Section 14] is the personal guilt provision of the bill. It provides that whenever a corporation shall be guilty of

[20] The opinion has not yet been reported. It is reprinted in Appendix C, *infra*, pp. 81–93.

> a violation of any of the provisions of the antitrust laws the offense shall be deemed to be also that of the individual officers or agents of such corporation, and upon the conviction of the corporation, any director, officer, or agent who shall have authorized, ordered, or done any of such prohibited acts shall be deemed guilty of a disdemeanor and upon conviction therefor shall be punished as prescribed in this section. [H. Rep. No. 627, 63d Cong., 2d Sess., p. 20.]
>
> Existing antitrust acts are further supplemented by a provision that whenever a corporation shall violate the antitrust acts such violation shall be regarded as that also of the individual directors and officers of the corporation who shall have authorized, ordered, or committed any of the acts constituting such violation, thus fixing the personal guilt of the officials of the corporation who are responsible for the infraction of the law. [S. Rep. No. 698, 63d Cong., 2d Sess., pp. 1–2.]

These statements contain no suggestion that Section 14 was intended to supersede the existing Sherman Act criminal liability of corporate officials, and do not overcome the repeated assurances given by the sponsors of the legislation to the Congress that the Clayton Act was not intended to change the penal provisions of the Sherman Act.

Both reports did no more than summarize what the section provided. The section was "the personal guilt provision of the bill" because it was the only section of the bill that dealt with criminal liability; the other sections prohibited certain anticompetitive practices, and dealt with civil enforcement remedies. The guilt was "personal" in that it related to the guilt of indi-

viduals, as distinguished from that of their corporations. The statement that, upon conviction of violating Section 14, the corporate official was to be "punished as prescribed in this section" was merely a summarization of the provision that, upon conviction, an individual "shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court." It cannot be read as implying that the only punishment to be imposed upon corporate officials for violation of the antitrust laws was to be that "prescribed in this section."

Similarly, the statement in the Senate Committee Report that the provision had the effect of "fixing the personal guilt of the officials of the corporation who are responsible for the infraction of the law" does not indicate, or even suggest, that such individuals could not also be prosecuted under the Sherman Act. The bill "fixed" their personal guilt only in the sense that it specified that corporate antitrust violations were also to be regarded as the violations of the corporate officials who had authorized, ordered or committed any of the acts constituting such violation. It did not thereby "unfix" their personal guilt under the Sherman Act for their violations of that statute. On the contrary the Senate Report stated that "[e]xisting antitrust laws are further supplemented" by the new provision.

Whenever a corporate official is guilty of violating the antitrust laws, he is "personally" guilty in the sense that he is being punished for his own personal active participation therein. Such "personal" guilt is

to be distinguished from the vicarious criminal liability that some statutes impose upon corporate officers for actions done by the corporation, whether or not they personally participated therein (see note 21, *infra*, p. 45).

2. Appellee also urges (Motion to Affirm, p. 7) that, unless Section 14 is construed as providing the exclusive method for prosecuting corporate officials, it has no meaning; and that settled rules of statutory construction preclude such a result. Neither the premise nor the conclusion of this argument is correct.

The legislative history of Section 14 demonstrates that Congress enacted that Section in order to reach certain conduct by corporate officials which it believed could not be successfully prosecuted under the Sherman Act. As Representative Floyd explained (51 Cong. Rec. 9609):

> * * * The purpose we had was to make it clear that, when a corporation had been guilty, those officers, agents, and directors of the corporation that either authorized, ordered, or did the thing prohibited should be guilty. Under the existing law, and without that provision of the statute, the person who did the things would undoubtedly be guilty; but in the enforcement of the criminal provisions of the Sherman law, experience has demonstrated that both juries and courts are slow to convict men who have simply done acts authorized or ordered by some officers of the concern higher up, and the words "authorized" and "ordered" were introduced to reach the real offenders, the men who caused the things to be done; and if the language is

> susceptible of any ambiguity and is not clear, we desire to make it clear. * * *

Representative Floyd further pointed out (51 Cong. Rec. 16320) that the provision was intended to permit prosecution of corporate officials for any acts which, although not constituting "the whole offense" or not sufficient to make them conspirators (and hence not sufficient to establish their guilt under the Sherman Act), would nevertheless "constitute in whole or in part that [corporate] violation."

There is an obvious difference between authorizing something to be done and actually ordering or doing it. It was not clear in 1914 whether corporate officers and directors who merely authorized antitrust violations could be criminally prosecuted under the Sherman Act. For example, if a regional manager, at the direction of a vice president, engaged in predatory price-cutting for the purpose of driving a competitor out of business, both officials would plainly have violated the Sherman Act. If, however, the regional manager on his own initiative decided to embark upon such a program, and the vice president had merely authorized such action, it was doubtful whether the courts would then have viewed the latter as having violated the Sherman Act. Congress plainly intended to reach such conduct by higher officials, however, under the broader standard of Section 14,[21] which

[21] It is also possible to distill from the legislative debates on Section 14 an indication that a limited degree of absolute liability was being imposed upon responsible corporate officers for violations of the antitrust laws by their subordinates. See 51 Cong. Rec. 5609, 5676, 5681, 14324. This responsibility did not go so far as that imposed upon corporate officials under the 1906 Pure Food and Drug Laws, where a responsible officer

made criminal acts by "individual directors, officers or agents * * * who shall have authorized * * * any of the acts constituting in whole or in part" the corporate violation. As Representative Floyd explained, "we are seeking to reach the directors and the high officers of these corporations who authorize or direct their employees to do acts which constitute violations of the antitrust laws" (51 Cong. Rec. 9676). "We cannot reach the men who are directly responsible, the men who authorize and direct the acts to be done * * * the rich director or officer who sits back in his room and directs the employee to do the things prohibited * * * is never touched and never convicted" (51 Cong. Rec. 9678).

Similarly, if corporate officers had undertaken a predatory campaign to monopolize a market, the general authorization and ratification of such program by the directors might not have been regarded as suffi-

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of a corporation violating its provisions may be guilty of a misdemeanor even if he is totally unaware of the activities constituting the violation (see *United States* v. *Dotterweich*, 320 U.S. 277). But statements by both Congressmen Floyd and Lenroot (see Appendix B, *infra*) indicate that Congress intended to impose absolute liability upon any corporate officer authorizing, ordering, or himself doing anything which is in fact part of an antitrust violation, regardless of their knowledge of the objective of the entire course of action. Such an imposition upon major corporate officials of criminal liability regardless of their degree of knowledge of the offense, as a prophylactic measure to insure that they exercise particularly close supervision over their subordinates, was not unusual at the time of the Clayton Act. See, in addition to the Pure Food and Drug Act, *supra*, the Revenue Act of 1918, Section 1308(d), 40 Stat. 1143; Merchant Marine Act, 1920, Section 30J(b), 41 Stat. 1003.

cient in 1914 to subject them to criminal liability. They were plainly covered, however, by Section 14.

The precise extent of any additional liability that Section 14 may actually have imposed upon corporate officials presents a difficult question. But there is no need here to determine the precise boundaries of such liability. For it is beyond dispute that Congress, in enacting Section 14, at least *thought* it was imposing some new criminal liability on corporate officials that went beyond their existing Sherman Act liability. See 51 Cong. Rec. 9609, 9676, 9678–9679, 9681, 16320, Appendix B, *infra*, pp. 73–80. While it may not be clear precisely how far Congress went and what it actually accomplished in Section 14, beyond reaffirming the criminal liability of corporate officials responsible for their corporations' Sherman Act violations, it is clear from the legislative history what Congress did *not* do. It did not repeal or in any way limit the existing Sherman Act liability of corporate officials.

It is thus beside the point that most conduct by corporate officials that violates the Sherman Act would also violate Section 14. For a criminal statute is not repealed merely because a subsequent statute also penalizes the same conduct. See *United States* v. *Gilliland*, 312 U.S. 86, 95–96; *United States* v. *Beacon Brass Co.*, 344 U.S. 43; *Rosenberg* v. *United States*, 346 U.S. 273, 294; *Berra* v. *United States*, 351 U.S. 131, 134. In the present case, as we have shown (*supra*, pp. 10–11), the language of Section 1 plainly covers appellee. and the legislative history of the Clayton Act confirms that Congress intended such

criminal liability of corporate officials to remain unimpaired. There is thus neither the "positive repugnancy" between the provisions of the Sherman Act and Section 14 of the Clayton Act, nor that "clear and manifest" "intention of the legislature to repeal" (*United States* v. *Borden Co.*, 308 U.S. 188, 198–199), which is necessary for repeal by implication.

III

THE POST-1914 CRIMINAL ENFORCEMENT OF THE SHERMAN ACT, THE JUDICIAL DECISIONS, AND THE 1955 INCREASE IN THE SHERMAN ACT'S CRIMINAL PENALTIES, ALL SHOW THAT SECTION 14 DOES NOT PROVIDE THE EXCLUSIVE METHOD FOR PROSECUTING CORPORATE OFFICIALS FOR ANTITRUST VIOLATIONS

The government's position that corporate officials may be prosecuted under the Sherman Act is further supported by the history of criminal antitrust enforcement following the enactment of Section 14. This history shows that, after the passage of the Clayton Act, the government continued to follow its established practice of indicting corporate officials under the Sherman Act; that this practice was not challenged until 1939, and was then upheld; that, prior to the decision below, no court had ever held that corporate officials could not be prosecuted under the Sherman Act; and that every reported decision which considered the issue upheld the Sherman Act prosecution. In addition, the action of Congress in 1955 in increasing the maximum fine under the Sherman Act from $5,000 to $50,000, but making no change in the $5,000 fine under Section 14, further confirms

that Section 14 was never intended to exclude prosecution of corporate officials for antitrust violations under the Sherman Act.

The court below discounted this history, on the ground that whether a corporate official was liable under the Sherman Act or under Section 14 "constituted no problem" until the Sherman Act fines were increased in 1955 (R. 39). But it is most improbable that, if Section 14 became the sole method for prosecuting corporate officials for antitrust violations, they would not have sought dismissal of Sherman Act indictments against them and, if such indictments were upheld, have sought appellate review.

A. THE GOVERNMENT, AFTER ENACTMENT OF THE CLAYTON ACT, CONTINUED TO PROSECUTE CORPORATE OFFICIALS UNDER THE SHERMAN ACT

If Section 14 of the Clayton Act was intended to be the sole method for prosecuting corporate officials after 1914, one would suppose that the government would promptly have changed its prior settled practice of prosecuting such persons under the Sherman Act. But, in the five years following the enactment of the Clayton Act, there were at least 15 indictments filed charging corporate officials with violations of the Sherman Act.[22] A number of these indict-

[22] See *United States* v. *William Rockefeller* (S.D.N.Y., 1914); *United States* v. *Isaac Chapman* (S.D.N.Y., 1915); *United States* v. *Michael Boyle* (N.D. Ill., 1915); see 259 Fed. 803 (C.A. 7) (affirming conviction of individual defendants); *United States* v. *S. H. Cowell* (D. Ore., 1916), see 295 Fed. 577 (C.A. 9) (sustaining conviction and fine of two individual

ments included, as defendants, agents or employees ranking well below the principal corporate officer level. Although all of these individuals were indictable under Section 14, the indictments never referred to that section or utilized its language. Nor did any of these indictments allege or otherwise suggest that the officer was acting on his own account. During the same period, the government brought no indictment under Section 14.

The same pattern continued unchanged for the next forty years. During this period corporate officials ranging from presidents and chairmen of the boards of directors to salesmen and other lesser agents were indicted in more than two hundred cases for violations of the Sherman Act; in none of these indictments was there any reference to Section 14 of the Clayton Act. Up to 1939, the indictments generally stated that the individual defendants "have been actively engaged" in "conducting the business and affairs" of the corporation (see, *e.g.*, *United States* v. *Louis Bregler Co.* (N.D. Ill., 1921), or in "the mangement, direction and con-

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defendants); *United States* v. *Jensen Creamery Co.* (D. Idaho, 1917); *United States* v. *Aileen Coal Co.* (S.D.N.Y., 1917); *United States* v. *Algoma Coal & Coke Co.* (S.D.N.Y., 1917); *United States* v. *Baker-Whiteley Coal Co.* (S.D.N.Y., 1917); *United States* v. *Mead* (S.D.N.Y., 1917), D. & J. 860 (guilty pleas); *United States* v. *Chicago Mosaic & Tiling Co.* (N.D. Ill., 1917); *United States* v. *M. Piowaty & Sons* (D. Mass., 1917); *United States* v. *Walter G. St. Clair* (Sup. Ct. D.C., 1917); *United States* v. *Thomas Barton* (W.D. Va., 1917); *United States* v. *Constantine Belfi* (E.D. Pa., 1917), see 259 Fed. 822 (affirming convictions of eight of ten defendants convicted); *United States* v. *Sumatra Purchasing Corp.* (S.D. N.Y., 1918) (indictment under Sherman Act and Wilson Tariff Act, 15 U.S.C. 8–10).

trol" of corporate "affairs" (see, *e.g., United States* v. *The Atlas Portland Cement Co.* (S.D.N.Y., 1921). Thereafter, the indictments with increasing frequency used the language of Section 14 of the Clayton Act to detail the participation of the defendant corporate officers in the conspiracy, *i.e.*, that such officials had "authorized, ordered or done the acts" charged. As we shall show in the next section, the practice of using this language in Sherman Act indictments had judicial sanction. In view of the practical difficulties inherent in attempting to try corporations and their officers together under the two statutes, however, the government has followed the policy of continuing to prosecute corporate officials under the Sherman Act. Prior to the decision below there had been only one case in which a corporate official had been indicted under Section 14 (*United States* v. *Potts,* Criminal 56–157–M (D. Mass.), filed June 28, 1956 (after maximum Sherman Act fines had been increased)).[23]

B. THE JUDICIAL DECISIONS SUBSEQUENT TO THE ENACTMENT OF THE CLAYTON ACT HAVE UPHELD THE PROSECUTION OF CORPORATE OFFICIALS UNDER THE SHERMAN ACT

Following the enactment of the Clayton Act, a number of courts again considered whether corporate officials were properly charged under the Sherman Act for antitrust violations committed in their corporate

[23] The indictment, which is solely under Section 14, charged that Potts was New England Divisional Manager of Socony Mobil Oil Co., that Socony had entered into a number of contracts with service station operators in violation of Section 1 of the Sherman Act by which in return for an agreed rebate the dealers agreed to fix the prices at which they sold gasoline, and that Potts authorized acts constituting part of the offense by authorizing specific rebates. The indictment was subsequently dismissed prior to any clarifying litigation.

capacity. Those cases consistently upheld the validity of the Sherman Act charges, and rejected any suggestion that Section 14 of the Clayton Act provides the exclusive method of prosecution.

1. The first references to Section 14 in reported decisions are in the series of cases growing out of the 1924 indictment in *United States* v. *National Malleable & Steel Castings Co.* (Cr. 8015, N.D. Ohio). That was a single court indictment charging 52 corporations and 49 of their officers with violating Section 1 of the Sherman Act. It did not cite Section 14. The indictment alleged with respect to the individual defendants that the corporate defendants "had divers officers and agents who have been actively engaged in the management, direction and control of their affairs and business", and that both corporate and individual defendants had each knowingly "engaged in a combination in restraint of said interstate trade and commerce in malleable iron castings so carried on by said corporate defendants".

In *United States* v. *National Malleable & Steel Castings Co.*, 6 F. 2d 40, 41 (N.D. Ohio), the district court upheld the indictment against a demurrer alleging that the participation by the individual defendants in the alleged violations had not been sufficiently averred. It stated:

> The criminal participation of the individual defendants, as officers having the active management, direction, and control of the interstate trade and business of the corporate defendants engaged in the illegal combination or conspiracy, is sufficiently averred, with in the authorities and within the terms of section 14, Act

> Oct. 15, 1914, known as the Clayton Act (Comp. Stat. § 8835m). The elements of the crime are not only charged in the language of the statute, but the means whereby the combination or conspiracy is and has been formed and carried on, and the details thereof adequate to identify the specific combination or conspiracy, and to enable the defendants to prepare for trial and to protect them against a new prosecution in the event of acquittal or conviction, are likewise all set forth with particularity and definiteness. *If the allegations of the indictment are proved, each and all of the defendants are guilty of a violation of section 1 of the Sherman Act.* [Emphasis added.]

In so holding, the court cited the *American Naval Stores, MacAndrews & Forbes* and *Patterson* cases, discussed *supra,* pp. 22–24, 25–26, 29–31.[24]

The sufficiency of the indictment in charging various individual defendants with violations of the Sherman Act was also raised in a number of cases in which the defendants sought to prevent their removal to the Northern District of Ohio for trial. See *United States ex rel. Hughes* v. *Gault,* 271 U.S. 142; *Fitzgerald* v. *United States,* 6 Fd. 2d 156 (C.A. 1); *Meehan* v. *United States,* 11 F. 2d 847 (C.A. 6); *United States ex rel. McGrath* v. *Mathues,* 6 F. 2d

[24] The court also cited the decisions upholding the Sherman Act indictments and convictions in *Boyle* v. *United States,* 259 Fed. 803 (C.A. 7; and *Belfi* v. *United States,* 259 Fed. 822 (C.A. 3). In both of those cases officers or agents of corporations appear to have been among the individual defendants indicted and convicted, but neither the indictments (returned in 1915 and 1917, respectively) nor the decisions mention Section 14 of the Clayton Act.

149 (E.D. Pa.); *United States* v. *Moore*, 7 F. 2d 734 (E.D. Ill.). In at least three of these cases the lower courts, in holding that the indictments sufficiently charged the individual defendants with participation in the alleged combination to support the charge under the Sherman Act, also relied on the language of Section 14 of the Clayton Act. See *United States ex rel. McGrath* v. *Mathues*, *supra*, 6 F. 2d at 153; *Fitzgerald* v. *United States*, *supra*; and *Meehan* v. *United States*, *supra*, 11 F. 2d at 849–50. The *Meehan* case is particularly interesting because there it was claimed that the defendant Howell had been described by the government, in evidence offered in support of its removal petition, as being only the assistant manager of his corporation while the company had other individuals functioning as president and general manager. But the court held that the indictment clearly charged that

> the corporate defendant, in its unlawful acts, has been under the management, direction, and control of Howell, and that its elimination of competition by agreement and its allotment of exclusive customers, have been done under Howell's direction. This seems to us sufficient, either under the general principles involved or under Section 14 of the Clayton Act.

Those cases thus viewed Section 14 not as precluding, but as supporting, prosecution of corporate officials under the Sherman Act.

This Court's opinion in *Hughes* v. *Gault*, *supra*, does not refer to Section 14 of the Clayton Act. But the government relied upon the lower court decisions mentioned above, which had cited Section 14 to sup-

port the sufficiency of the indictment. And the individual defendant Hughes, in contending that the indictment did not charge him with any crime under the Sherman Act, argued (271 U.S. at 145) that he "and the other natural persons named in the indictment are not charged with having authorized or done any act claiming to be illegal, but merely with having been officers or agents of the defendant corporations". This argument was, in substance, that the defendant was not, but should have been, charged in the language of Section 14. This Court summarily rejected this argument, holding (271 U.S. at 151):

> We do not regard the attack upon the indictment as needing discussion. It has been upheld by a number of District Courts and by the Circuit Court of Appeals for the Sixth Circuit as sufficient for removal purposes. It alleges that the Iowa Malleable Iron Company under the charge of the relator was party to an agreement to eliminate competition in interstate trade and to fix excessive and noncompetitive prices, and that the company and the relator are engaged in a conspiracy in restraint of trade among the States. The relator is not left in doubt of the effort of the grand jury to present him as criminal under the Sherman Act.

2. Section 14 was not referred to in any subsequent case until the 1939 decision in *United States* v. *General Motors Corporation*, 26 F. Supp. 353 (N.D. Ind.), affirmed, 121 F. 2d 376 (C.A. 7), certiorari denied, 314 U.S. 618. The defendants in that case were General Motors Corporation, three of its subsidiary corporations and 19 individual defendants described in

the indictment as the "officers, employees, representatives and agents [known to the grand jury] who have been actively engaged in the management, direction, and control of the affairs and business of said corporations." These individual defendants were alleged to have conspired among themselves and with the corporate defendants to compel General Motors dealers to use a General Motors subsidiary to finance new automobile purchases. No single individual defendant was alleged, however, to have authorized, ordered or himself done any of the acts charged in the indictment. A general demurrer was filed alleging, among other things, that the indictment "fails to aver that the individual defendants authorized, ordered or did any of the acts or things constituting all or part of the criminal offenses sought to be charged thereby." It was also charged that the indictment was duplicitous in that it purported to charge more than one crime in one count.

In their brief in support of the demurrer the defendants contended (p. 76) that "the only manner in which the individual defendants can be held is under Section 14 of the Clayton Act." They argued that the language of the indictment was not sufficient under Section 14 of the Clayton Act, since the allegations failed to show that the individual defendants "performed a single act complained of or had anything whatever to do with the conduct alleged to have constituted the offense" (*ibid.*). But, they argued, if the allegations of the indictment were sufficient to charge any criminal offense against the individual

defendants, then that offense was under Section 14 of the Clayton Act and the indictment was duplicitous. In this connection they made the same arguments which the district court adopted in the present case. They contended (p. 79):

> If the charge of the indictment is well laid against the individuals they are guilty not under the Sherman law but under the Clayton Act. The only allegations of the indictment referring to them describing them as officers, employees, representatives and agents of the corporate defendants and they are charged with no conduct engaged in otherwise. There is no suggestion that they entered into a conspiracy *in their own right* and they could not possibly be held on an indictment under the Sherman law. They are guilty under Section 14 of the Clayton Act or they are innocent. [Emphasis added.]

The district court summarily rejected this argument. It held (26 F. Supp. 355):

> The indictment charges certain individual defendants with conspiring with the other defendants, including corporations in which they are officers. The fact that they are described as officers of the corporations does not mean that their conduct as such officers is complained of, but rather they are charged as individuals, together with the corporations, with violations of the Sherman Anti-Trust Act.

Appellee suggests (Motion to Affirm, p. 11) that the above language indicates that the district court was making a "clear distinction" between individuals who act on their own behalf, and are subject to the Sherman Act, and those who act in a representative

capacity. In the context of the indictment and the motions and pleadings before the court, this position is untenable. There was not a word in the indictment which suggests that the General Motors officers named as defendants were acting on their own behalf. On the contrary, as indicated above, the only description of the officers was that they were "actively engaged in the management, direction, and control of the affairs and business of said corporation." Plainly, an officer of the General Motors Corporation engaged in a conspiracy to restrict the financing of General Motors cars did not have any personal stake in the conspiracy other than that of any corporate officer who naturally hopes that his activities on behalf of the corporation will ultimately redound to his benefit. In context, the statement that "their conduct as such officers" was not complained of "but rather they are charged as individuals" necessarily was a rejection of the individual defendants' argument that they could be tried only under Section 14. The court thus held that, since they were charged with individual participation in the alleged violations, they were properly charged under the Sherman Act.

3. The only other decision in a criminal case [25] prior to the 1955 amendment to the Sherman Act (see pp.

[25] In *United States* v. *Vehicular Parking Ltd.*, 54 F. Supp. 828 (D. Del.), a civil action was brought under Section 4 of the Sherman Act to enjoin a number of corporations and some of their officers from restraining commerce in the manufacture, distribution and sale of parking meters. One of the individual defendants alleged that the basic liability of such defendants had to be based upon Section 14 of the Clayton Act and that consequently they could be enjoined only under Section 15 of that Act (15 U.S.C. 25) and not under Section 4

63–67, *infra*) which refers to Section 14 is *United States* v. *Atlantic Commission Company*, 45 F. Supp. 187 (E.D.N.C., 1942). There several corporations and a number of their officers were indicted for a conspiracy to restrain and monopolize interstate commerce in potatoes, in violation of Section 1 and 2 of the Sherman Act. Paragraph 10 of the indictment, in accordance with the government's general practice since the time of the *General Motors* case, *supra*, charged that reference therein "to any act, deed or transaction on the part of any corporate defendant * * * shall be deemed to mean that the officers, agents, and employees of said corporation * * * ordered or did such act * * * for and on behalf of said corporation while actively engaged in the management, direction, and control of its affairs". The defendants alleged that this paragraph charged the individuals with conduct constituting a violation of Section 14, and that, since the indictment in terms charged them with violation of the Sherman Act, the count was duplicitous. The court rejected this argument, holding that the cited paragraph of the indictment was "merely descriptive" (45 F. Supp. at 194). It noted that if such descriptive language had not been included in the indictment "it might have been

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of the Sherman Act. The court summarily rejected this contention. It stated that "the Clayton Act is not relied upon by the Government for its application in the instant case is superfluous," since the individual defendants had been charged under the Sherman Act and found to have had the necessary "participation" in the violation to justify a determination that they had violated the Sherman Act (see 54 F. Supp. at 840, n. 17).

contended that it was defective in not sufficiently charging participation in the conspiracy the 17 individual defendants named" (*id.* at 195). The court analyzed the legislative history of Section 14 of the Clayton Act and concluded [26] (45 F. Supp. 194):

> If the officer or agent is personally charged with participation in the conspiracy there is no necessity for the application of Section 14 of the Clayton Act. It is now well settled that officers and agents may be indicted with their corporation under the Sherman Act [citing the *MacAndrews & Forbes, American Naval Stores,* and *General Motors* cases, *supra*]. Inasmuch as officers and agents may be indicted with their corporation under the Sherman Act in a single count and since they are here so indicted, there is no necessity for an application of Section 14 of the Clayton Act. The corporate

[26] The court said that Section 14 had been passed "in order to create a method of punishing directors who took part in certain unlawful conduct under the anti-trust laws. Under Section 1 of the Sherman Act, a combination may be charged with entering into contracts to unlawfully restrain trade, apart from the offense of conspiracy. In some of the earlier cases under the anti-trust law, individual defendants sought to escape the application of the law on the ground that it was the corporate defendant that had entered into unlawful contracts and that its officers and agents could not be held unless they were shown to have participated in a conspiracy [citing the *Union Pacific Coal Company* case, *supra*, at p. 24]. Section 14 extended the scope of the personal responsibility for acts of corporations in violation of the anti-trust laws, but it did not create any new specific tests of its own by which violations of the anti-trust laws may be measured, as do some sections of the Clayton Act" (45 F. Supp. at 194).

> defendants and the individuals named in the indictment are charged with a conspiracy among themselves to restrain trade and commerce and to monopolize trade and commerce in potatoes. The charge in its entirety is under the Sherman Act.

4. Thus, none of the cases construing criminal indictments of corporate officials under the antitrust laws since the adoption of the Clayton Act in any way suggests that Section 14 is the exclusive section under which defendants "having active management, direction, and control of the corporation" may be indicted. On the contrary, the *National Malleable*, *General Motors* and *Atlantic Commission* cases all expressly held that such corporate officials may be prosecuted under the Sherman Act.

The court below in the present case suggested (R. 38), however, that the "applicability" of Section 14 is demonstrated by this Court's reference to it in *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 434. That was a civil case in which the district court had found that a number of corporations and some of their officers had violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. This Court upheld the adjudication of violation by the corporations and a number of the "individual defendants who in the past have acted as, and who at present are, officers or directors of the corporate defendants * * * [and who] offended against the antitrust laws by acting on behalf of, or in the name of, a corporate defendant" (pp. 433–434, see also pp. 401–402). It held, however, that "there is no apparent necessity

for including them individually in each paragraph of the decree which is applicable to the corporate defendants * * *'" (p. 434). The Court then added (*ibid.*):

> That these individuals may have rendered themselves liable to prosecution [28] by virtue of the provisions of § 14 of the Clayton Act [29] is beside the point, since relief in equity is remedial, not penal.

[28] *United States* v. *Socony-Vacuum Oil Co.*, 23 F. Supp. 937, affirmed 310 U.S. 150.

[29] [Citing text of Clayton Act Section 14.]

This brief reference to criminal liability under Section 14 of the Clayton Act [27] is neither a holding nor dictum that officials might not also be criminally prosecuted under the Sherman Act. For the Court expressly recognized that the individual defendants in that very case had been properly found to have violated the Sherman Act in the civil action there under review, and there is no basis for holding that the word "person" in Sections 1–3 of the Sherman Act applies to corporate officers in civil actions brought under Section 4 of the Sherman Act but not to crimi-

[27] The Court's reference to Section 14 may have stemmed from the citation of that provision in the government's brief as "confirmation * * * for the view that Congress wished to make it perfectly clear in this field that individual corporate officials were to be personally responsible for their own conduct" (see Brief for the Government on Reargument in Nos. 2–11, O.T. 1944, p. 39). But the brief made clear that Section 14 "did not embody any new principles, but merely insured that such persons will not escape criminal punishment" (*id.* at 38–39, footnote omitted).

nal actions. Moreover, the *Socony-Vacuum case*, which the Court cited directly prior to the reference to Section 14, was a case in which a number of corporate officers were indicted and convicted along with their corporations, solely for violation of the *Sherman Act*. *Hartford-Empire* thus casts no doubt upon the applicability of the Sherman Act to corporate officers.

C. THE ACTION OF CONGRESS IN 1955 IN INCREASING THE MAXIMUM FINE UNDER THE SHERMAN ACT CONFIRMS THAT CORPORATE OFFICIALS MAY BE PROSECUTED UNDER THAT ACT

In 1955 Congress increased the maximum fine for violating the Sherman Act from $5,000 to $50,000 (69 Stat. 282), but made no change in the $5,000 maximum fine under Section 14 of the Clayton Act. The circumstances surrounding the enactment of this change further confirm the view that corporate officials may be prosecuted under the Sherman Act, and refute appellee's suggestion (Motion to Affirm, p. 16) that Congress intended to impose only the lower penalty under Section 14 for antitrust violations committed by corporate officials.

1. The 1955 Act had its origin in a 1950 proposal by the Department of Justice (H.R. 6679, 81st Cong., 2d Sess.) which would have increased the maximum fines under both Sections 1–3 of the Sherman Act and Section 14 of the Clayton Act to $50,000.[28] During the

[28] The Final Report of the Temporary National Economic Committee in 1941 had recommended that the maximum fine "under the antitrust laws" be increased to $50,000 since "the courts are reluctant to punish a criminal violation by imprisonment" and the existing $5,000 figure "is clearly inadequate as a deterrent

hearings on the bill, Assistant Attorney General Bergson was asked whether he believed that both the Sherman Act and Section 14 of the Clayton Act should have the same maximum penalty (Hearings Before Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary on H.R. 6679, 81st Cong., 2d Sess., p. 4). He responded (*id.* at pp. 4–5):

> So far as the Department is concerned, we are primarily interested in section 1 of this bill [which raised the fine for violations of the Sherman Act]. Section 2 [which raised the fine for violation of Section 14 of the Clayton Act] would be applicable both to violations of the Sherman Act and the Clayton Act, and the Wilson Tariff Act so that so far as one portion of section 2 is concerned, it really is not necessary if you amend section 1.
>
> I do not know that violations of the Wilson Tariff Act are of sufficient gravity for the maximum fine to be increased to $50,000. So far as the Clayton Act is concerned, we are not urging the enactment of section 2. We would not object to it if in your wisdom, you thought that it should be raised to $50,000. We think that raising the penalty under the Sherman Act * * * [w]ould accomplish the purposes that we would like to see accomplished.

Representative Patman similarly stated during the hearing that no increase in the penalties for violation

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to businessmen or to groups of businessmen whose incomes are in the millions * * *". See, S. Doc. No. 35, 77th Cong., 1st Sess., p. 40. See also Monopolistic and Unfair Trade Practices, Report of House Select Committee on Small Business, 80th Cong., 2d Sess. (1948), p. 24.

of Section 14 was required (*id.* at 15–16). The bill, as reported out, covered only the Sherman Act. In the floor debates Congressman Celler explained that "[w]e considered increasing the penalties of the Clayton Act, the Federal Trade Commission Act, and the other kindred acts, like the Robinson-Patman Act, but the Department of Justice seemed to be of the opinion it would be sufficient merely to increase the penalties of the Sherman Act, since most of the cases involving antitrust violations are brought under the Sherman Act; therefore, we deemed it advisable not to go too far * * *." 96 Cong. Rec. 8071.

The bill passed the House, but died in the Senate. A similar bill (H.R. 2237) in the 83d Congress, also limited to the Sherman Act, again passed the House, but not the Senate. In the 84th Congress, however, a bill (H.R. 3659) which increased the maximum fines for violation of the Sherman Act to $50,000 was finally adopted. Just prior to enactment of this bill, the 1955 Report of the Attorney General's Committee to Study the Antitrust Laws recommended an increase in Sherman Act maximum fines from $5,000 to $10,000; it did not mention Section 14 in this connection.

The hearings and debates on the bill in the 81st Congress, and the House and Senate Reports and the debates on the bill which was finally adopted in 1955, were primarily concerned with the necessity of providing a penalty that would be sufficiently severe to be an effective deterrent upon corporate antitrust violators. But while the reports and debates do not

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specifically state that corporate officials (as distinguished from their corporations) would also be subject to the higher fine, they leave no doubt that Congress intended to, and did, increase the penalties for such individuals. See H. Rep. No. 1906, 81st Cong., 2d Sess., pp. 4–5; H. Rep. No. 70, 84th Cong., 1st Sess., pp. 1, 3–5; S. Rep. No. 618, 84th Cong., 1st Sess., pp. 2, 3; 96 Cong. Rec. 8071, 8076; 101 Cong. Rec. 3942–3945, 3947. For example, the House Committee Report on the 1955 bill pointed out (H. Rep. No. 70, 84th Cong., 1st Sess., p. 3) that since "[j]udges have likewise been reluctant to send individuals to jail for Sherman Act violations," usually "the only penalty which is imposed under the act is a fine of not more than $5,000. This, the committee feels, is grossly inadequate. The purpose of the present bill is to authorize the more flexible and effective punishment of a fine up to $50,000."

2. This history makes it clear that the only reason Congress did not increase the maximum fine under Section 14 was because it believed that such an increase was unnecessary, i.e., that increasing the fine under the Sherman Act would provide an adequate deterrent to both corporations and their officials. This was the substance of Assistant Attorney General Bergson's 1950 statement that " raising the penalty under the Sherman Act * * * [w]ould accomplish the purposes that we would like to see accomplished." For at that time the Department of Justice had prosecuted literally hundreds of corporate officials under the Sherman Act, and had never found it necessary to prosecute under Section 14.

There is nothing in the legislative history that suggests that Congress intended to limit the higher fine to corporations (and to partners and individual proprietors of small businesses), and not to cover the corporate officers who are responsible for the corporate violations. Indeed, in view of the clear purpose of Congress to make the criminal penalties under the antitrust laws a more effective deterrent, the failure of Congress to change the fine under Section 14 is the clearest evidence that Congress believed that the higher Sherman Act fines would be the standard of punishment for corporate officials as well as their companies. If Congress had thought that such officials could be prosecuted only under Section 14, it is inconceivable that it would not also have increased the $5,000 fine under that section—an amount which the House Committee considered "grossly inadequate" (H. Rep. No. 70, 84th Cong., 1st Sess., p. 3).

CONCLUSION

The order of the district court dismissing counts 11 and 12 of the indictment as to the appellee should be reversed.

Respectfully submitted.

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FEBRUARY 1962.

APPENDIX A

Name of case	Date indictment returned	Section of Sherman Act under which drawn	Defendants indicted	Disposition of case
1. *United States* v. *Joseph B. Greenhut* (D. Mass.).	Feb. 23, 1892 May 10, 1892 (2 indictments).	2 1 and 2	Officers and directors	1 indictment dismissed on demurrer (50 Fed. 469). Other indictment nolle prossed.
2. *United States* v. *John H. Patterson* (D. Mass.).	July 2, 1892; Oct. 5, 1892 (2 indictments).	1 and 2	Officers, directors, and agents	On demurrer indictment was sustained in part (55 Fed. 605; 59 Fed. 280). A nolle prosequi was then entered (D & J 680).
3. *United States* v. *James M. Moore* (D. Utah).	Nov. 4, 1895	3	2 corporations, 2 corporate agents (various other individuals)	Defendants convicted and fined (D & J 683); reversed on appeal on jurisdictional grounds (85 Fed. 465).
4. *United States* v. *Armour & Co.* (N.D. Ill.).	July 1, 1905	1 and 2	Corporations and the officers and directors.	Individual defendants were dismissed on plea of immunity (142 Fed. 808). Nolle prosequi entered as to corporate defendants (D & J 687).
5. *United States* v. *Virginia-Carolina Chemical Co.* (M.D. Tenn.).	May 25, 1906	3	31 corporations, 25 individual defendants (described as "officers, managers, agents and attorneys").	Demurrers to indictment denied (163 Fed. 66, 70) but plea in abatement sustained (163 Fed. at 76). Remaining defendants dismissed at Government's request (D & J 689).
6. *United States* v. *Mac Andrews & Forbes Co.* (S.D.N.Y.).	June 18, 1906	1 and 2	2 corporations, 2 presidents	Demurrers to indictment overruled (149 Fed. 823); individuals were acquitted and corporations convicted (149 Fed. 836).
7. *United States* v. *American Ice Co.* (Sup. Ct. D.C.).	July 12, 1906	3	2 corporations, 4 officers	Nolle prosequi entered (D & J 692).
8. *United States* v. *De Mund Lumber Co.* (D. Ariz.).	Oct. 23, 1906	3	3 corporations, 2 officers	Directed verdict for 2 of the corporations (D & J 701, 702); pleas in bar of 2 individual defendants were sustained; indictment dismissed as to 3d corporate defendant (D & J 700, 703).
9. *United States* v. *Phoenix Wholesale Meat Co.* (D. Ariz.).	Oct. 23, 1906	3	1 corporation, its president and principal stockholder.	Indictment dismissed as to principal stockholder because he testified for Government; corporation was acquitted; president was convicted, fined $1,000 (D & J 705); conviction was affirmed by Supreme Court of the Territory of Arizona (95 Pac. 85).

APPENDIX A—Continued

Name of case	Date indictment returned	Section of Sherman Act under which drawn	Defendants indicted	Disposition of case
10. *United States* v. *Shotter Co.* (S.D. Ga.).	Feb. 11, 1907	1	7 corporations, 9 corporate officers and employees.	4 corporations and 2 individuals pleaded guilty and were fined $5,000 each (D & J 707, 708); nolle prosequis entered as to remaining defendants.
11. *United States* v. *National Umbrella Frame Co.* (E.D. Pa.).	July 1, 1907	1	3 corporations, 1 individual proprietor, 4 corporate agents.	Corporations pleaded guilty, and were fined $1,000 each (D & J 715); indictment dismissed as to remaining defendants.
12. *United States* v. *Union Pacific Coal Co.* (D. Utah).	Nov. 20, 1907	1	3 corporations, 2 corporate agents.	Defendants were found guilty and fined (D & J 720). On appeal, convictions were reversed on ground that no conspiracy was proved (173 Fed. 737).
13. *United States* v. *American Naval Stores* (S.D. Ga.).	Apr. 11, 1908	1 and 2	2 corporations, 6 corporate officers.	Demurrer to the indictment overruled (186 Fed. 592). 5 individual defendants convicted on May 10, 1909 (D & J 729); conviction affirmed (186 Fed. 489) but reversed for errors in charge to jury (229 U.S. 373); retrial resulted in acquittal (D & J 732).
14. *United States* v. *American Sugar Refining Co.* (S.D.N.Y.).	July 1, 1909	1 and 2	1 corporation and its directors and agents.	Circuit court sustained plea of statute of limitations (173 Fed. 823) but the Supreme Court reversed (218 U.S. 601). Trial resulted in hung jury and indictment was nolle prossed (D & J 735).
15. *United States* v. *Albia Box & Paper Co.* (S.D.N.Y.).	Dec. 7, 1909	1	39 corporations, 52 officers and agents.	32 corporations pleaded guilty and were fined. Nolle prosequis were entered for all remaining defendants (D & J 736).
16. *United States* v. *Imperial Window Glass Co.* (W.D. Pa.).	Apr. 7, 1910	1 and 2	1 corporation, 15 officers and agents.	Demurrers were overruled; pleas of nolo contendere accepted and the corporation was fined $2,500; individual defendants $500 each (D & J 748).
17. *United States* v. *Cudahy Packing Co.* (S.D. Ga.).	Apr. 30, 1910	1	5 corporations, 3 corporate agents (branch house managers).	Demurrer to indictment sustained as to second count; nolle prosequi was entered on 1st count (D & J 750).
18. *United States* v. *Louis Swift* (N.D. Ill.).	Sept. 13, 1910	1	10 individuals "principal owners and the only real managers of their corporations."	Pleas in bar denied (186 Fed. 1002); demurrers to indictment overruled (188 Fed. 92); defendants acquitted at trial (D & J 752).

19. *United States* v. *Standard Sanitary Mfg. Co.* (E.D. Mich.).	Dec. 6, 1910	1	16 corporations, 34 corporate officers.	Immunity pleas denied (defendants had testified in previous equity suit). At trial defendants were convicted and 13 corporations and 14 individuals were fined (D & J 755).
20. *United States* v. *D. V. Purington* (N.D. Ill.).	Sept. 14, 1910	1	3 corporations, 4 corporate officers	Demurrers to indictment overruled; nolle prosequi entered (D & J 757).
21. *United States* v. *William C. Geer* (S.D.N.Y.).	Apr. 28, 1911	1	19 individuals (15 corporate officers, 1 corporate agent, 3 partners).	Demurrer to indictment overruled; 12 defendants were nolle prossed; 7 pleaded nolo contendere and were fined (D & J 758).
22. *United States* v. *Isaac Whiting* (D. Mass.).	May 26, 1911 (2 indictments).	1 1 and 2	7 individuals who were "the principal owners and actual and real managers" of various corporations.	Demurrer to 1st indictment was sustained but overruled as to 1st count of 2d indictment (212 Fed. 446); 1 defendant pleaded nolo contendere and was fined $500 and indictment was dismissed as to remaining defendants.
23. *United States* v. *William P. Palmer* (S.D.N.Y.).	June 29, 1911	1 and 2	26 corporate officers and agents (including 2 salesmen).	Defendants pleaded nolo contendere and were fined (D & J 760).
24. *United States* v. *J. B. Pearce* (N.D. Ohio).	July 19, 1911	1	8 officers and directors	Demurrer overruled; acquittal at trial (D & J 777).
25. *United States* v. *Hunter Milling Co.* (W.D. Okla).	Sept. 10, 1911	1	2 corporations, 1 corporate officer	Demurrer overruled; convicted at trial and fined (D & J 779).
26. *United States* v. *Winslow* (D. Mass.).	Sept. 19, 1911 (2 indictments).	1 and 2	6 directors and stockholders	Demurrer to 1st indictment and demurrer to 1 count of 2d indictment was sustained (195 Fed. 578); Supreme Court affirmed (227 U.S. 202). 2d indictment was nolle prossed.
27. *United States* v. *New Departure Mfg. Co.* (W.D.N.Y.).	Jan. 8, 1912	1 and 2	6 corporations, 18 individuals (16 of them officers and agents of the corporate defendants).	Plea in abatement (195 Fed. 778) and demurrer overruled (204 Fed. 107). Nolle prosequi entered as to 6 of the individual defendants. The remaining defendants pleaded guilty and were fined (D & J 783).
28. *United States* v. *North Pacific Wharves & Trading Co.* (D. Alaska).	Feb. 12, 1912	1 and 2	4 corporations, 7 officers and agents.	Demurrer to indictment sustained (D & J 787).
29. *United States* v. *Pacific & Arctic Ry.* (D. Alaska).	Feb. 12, 1912	1 and 2	1 corporation, 5 officers and agents.	Plea of statute of limitations was sustained (D & J 791).
30. *United States* v. *North Pacific Wharves & Trading Co.* (D.	Feb. 12, 1912	1 and 2	4 corporations, 9 officers and agents.	Demurrer to indictment overruled; at trial, indictment was dismissed as to the individual defendants, corporate defendants pleaded guilty and were fined (D & J 788–89).
31. *United States* v. *Pacific & Arctic Ry.* (D. Alaska).	Feb. 13, 1912	1 and 2	5 corporations, 13 officers and agents.	Demurrer to indictment sustained in part but reversed by Supreme Court (228 U.S. 87). Indictment dismissed as to the individual defendants; corporate defendants pleaded guilty and were fined (D & J 792–93).

APPENDIX A—Continued

Name of case	Date indictment returned	Section of Sherman Act under which drawn	Defendants indicted	Disposition of case
32. *United States* v. *John H. Patterson* (S.D. Ohio).	Feb. 22, 1912	1 and 2	30 officers and agents of National Cash Register Co. (president, general manager, assistant general manager, secretary, treasurer, director, 6 district managers, 12 managers, 3 agents, attorney and law clerk).	Demurrer to indictment overruled (201 Fed. 697). Trial resulted in conviction of 29 defendants and 27 were given jail sentences (D & J 795); court of appeals reversed on March 13, 1915 (222 Fed. 599) and indictment was nolle prossed (D & J 798).
33. *United States* v. *Julius F. Miller* (E.D.N.Y.).	Apr. 2, 1912	1	3 corporate officers	Demurrer to indictment sustained and indictment dismissed (D & J 799).
34. *United States* v. *Consolidated Rendering Co.* (D. Mass.).	Oct. 31, 1912 (2 indictments).	2	1 corporation, 4 officers and directors.	Nolle prosequi entered as to the individual defendants; corporation pleaded nolo contendere and was fined (D & J 754).
35. *United States* v. *Charles S. Mellen* (S.D.N.Y.).	Dec. 23, 1912	1	3 officers and directors	Indictment was nolle prossed.
36. *United States* v. *Hippen* (W.D. Okla.).	June 25, 1913	1	3 corporations, 10 corporate officers	Demurrer to indictment sustained (D & J 805).
37. *United States* v. *American Wringer Co.* (W.D. Penn.).	May 23, 1914	1	2 corporations, 8 officers and agents	Defendants pleaded nolo contendere and were fined (D & J 822).
38. *United States* v. *Booth Fisheries* (W.D. Wash.).	July 20, 1914	1	6 corporations, 5 officers and agents	Indictment was dismissed as to the individual defendants and one corporation. Rest pleaded nolo contendere and were fined.
39. *United States* v. *Western Cantaloupe Exchange* (N.D. Ill.).	Aug. 7, 1914	1 and 2	7 corporations, 13 corporate officers (15 other individuals).	Indictment was dismissed at the Government's request on Nov. 9, 1918, and a consent decree entered to a civil complaint filed that same day.
40. *United States* v. *Daniel P. Collins* (Sup. Ct. D.C.).	Sept. 14, 1914	3	31 individuals (including 11 corporate officers).	Demurrers to indictment overruled (D & J 825); 2 defendants were nolle prossed and rest pleaded nolo contendere (D & J 826-27).

APPENDIX B

EXCERPTS FROM CONGRESSIONAL DEBATES ON SECTION 14 OF THE CLAYTON ACT

Mr. FLOYD of Arkansas. * * * The purpose we had was to make it clear that, when a corporation had been guilty, those officers, agents, and directors of the corporation that either authorized, ordered, or did the thing prohibited should be guilty. Under the existing law, and without that provision of the statute, the person who did the things would undoubtedly be guilty; but in the enforcement of the criminal provisions of the Sherman law, experience has demonstrated that both juries and courts are slow to convict men who have simply done acts authorized or ordered by some officers of the concern higher up, and the words "authorized" and "ordered" were introduced to reach the real offenders, the men who caused the things to be done; and if the language is susceptible of any ambiguity and is not clear, we desire to make it clear * * * [51 Cong. Rec. 9609].

* * * * *

Mr. FLOYD of Arkansas. * * * Under the existing law the corporation may be convicted. True, * * * the corporation can only violate the law through the acts of its agents, officers, or employees; but we are proposing and seeking by this provision to visit guilt upon the real offenders.

Now, under the existing law, the man who does the act which constitutes a violation of the law can be punished as an individual, just as the corporation can be punished on account of the unlawful act of its

agents or officers. But we propose by this provision to hold as responsible under the criminal statutes the man who authorizes or orders wrongful things to be done. In other words, we are seeking to reach the directors and the high officers of these corporations who authorize or direct their employees to do acts which constitute violations of the antitrust laws * * * [51 Cong. Rec. 9676].

* * * * *

Mr. VOLSTEAD. It seems to me that this is open to the same objection as the original section. While it is true that the original section requires a conviction, this section requires first a showing that the corporation is guilty, because until there is proof of guilt the court could not say that the corporation is guilty. Nearly all our antitrust suits are brought as equity suits, because it is of very little use to bring a criminal suit against a corporation. Consequently, this will practically shield the persons participating in the guilty act by making their conviction depend upon the conviction of the corporation, which is not likely to take place.

Mr. FLOYD of Arkansas. I will say to the gentleman from Minnesota that we do not make the conviction of an individual conditional upon the guilt of the corporation. We provide that where the corporation is guilty it shall be deemed the offense of the officers, directors, or agents authorizing, ordering, or doing the thing prohibited, but they may be guilty independently of that, and if guilty may be tried and convicted without reference to the guilt of the corporation [51 Cong. Rec. 9677].

* * * * *

Mr. FLOYD of Arkansas. I desire to be perfectly frank. I desire to state that our idea was to so write the law that when one of those corporations had been

found guilty that the parties who were responsible for that violation of law could be punished for the acts that constituted that violation of law as individuals.

If they commit acts held to be unlawful they can be punished now, as I suggest, but we can not reach the men who are really responsible, the men who authorize and direct the acts to be done. They shelter themselves under technical provisions of the law, and some subordinate or minor employee of the corporation, some man who is paid $5 a day for his services, as in the sugar case, is convicted and sent to the penitentiary, while the rich director or officer who sits back in his room and directs the employee to do the things prohibited and gives him $5 a week extra to violate the law is never touched and never convicted. Our purpose is certainly good, and if the House can help us in perfecting the amendment we will welcome their assistance. But we regard this section as important. If the individual now violates the Sherman law he can be convicted independently of the conviction of the corporation, but we seek to impute to the individual in this provision the guilt of the corporation, and subject him to punishment, but in all fairness we do not make him guilty without further trial. We provide he shall be indicted, tried, and proceeded against in the usual way. That is the purpose of this section.

Mr. TOWNER. Mr. Chairman, will the gentleman yield for a question?

Mr. FLOYD of Arkansas. Yes.

Mr. TOWNER. Would it not be absolutely necessary in any prosecution against any individual to allege in the indictment that the corporation had been convicted, and would not the indictment be subject to demurrer unless the allegation was made in the indictment?

Mr. FLOYD of Arkansas. Under this particular section I will state to the gentleman that that might be true, but still that very fact would enable us to reach a class of cases that we can not now reach under existing law. But if the individual independently had violated the Sherman law and was guilty of violation of it in any way as an individual, he could be convicted without ever convicting the corporation, while if the guilt of the corporation is imputed to his acts as an individual, and those acts as an individual would not constitute a violation of the Sherman law, then under this provision, if written into the law, such acts would become unlawful and the adoption of this provision would bring these forbidden acts within the purview of the law and make the director, officer, or agent guilty, the guilt of the corporation being imputed to him.

Mr. TOWNER. But the injurious effect would be that you never could convict any individual without previously convicting the corporation.

Mr. FLOYD of Arkansas. The purpose of this section is to enable the Government, when it has convicted the corporation, to reach those responsible officers who have been proven in the trial to be guilty of a violation of law by presentment of an indictment and trial. It authorizes their conviction not only for acts done but for acts authorized or ordered to be done, and gentlemen who think this would be any protection to the corporation or its directors, officers, or agents and would give them any leniency entirely misconceives the purpose of this provision.

Mr. VOLSTEAD. Mr. Chairman, will the gentlemen yield?

Mr. FLOYD of Arkansas. Yes.

Mr. VOLSTEAD. Is not this true, that the Government very seldom indicts a corporation? It brings a suit in equity, while this compels a double action if

you seek to hold the individual criminally. It compels first a criminal action against the corporation and then perhaps a suit in equity, while under the law as it now stands you can indict and convict the individual without paying any attention to the corporation, so far as any criminal procedure is concerned, and you can at the same time pursue your remedy in equity.

Mr. FLOYD of Arkansas. In answer to the gentleman's question I will say this: That this in no way affects the procedure under existing law, either criminal or civil. If an individual is guilty of violating the Sherman law, he can be indicted independently of this provision; but the series of acts which constitute a violation of the Sherman law are not crimes within themselves under existing law. If we adopt this provision, whenever a corporation is convicted of violation of the Sherman law and the guilt of the corporation is imputed to the individual officers or agents of the corporation, then acts done in furtherance of and unlawful combination become within this provision specifically indictable offenses that are not indictable now; and the result would be that you could indict and convict the officers and agents that were responsible for that violation on a state of facts on which they will go free now, no matter how often you indict them, because those isolated acts are not sufficient in themselves to constitute a violation of the Sherman Act [51 Cong. Rec. 9678–79].

* * *

Mr. BARKLEY. Is not the real object of the section that there shall be unlimited power of prosecution, both of individuals and corporations, but the additional power that when the corporation itself is convicted the officers and directors shall also be guilty of the thing which is denounced by the law.

Mr. LENROOT. Not denounced by the law, but where they have contributed in any degree to the violation, althought their act, standing alone, might not be a violation.

Mr. BARKLEY. The amendment covers this ground specifically.

Mr. LENROOT. My amendment is to strike out the balance of the section and insert, so that it will provide that whenever the corporation shall violate any of the provisions of the antitrust laws—not leaving it to be determined in a criminal action; it may be determined in an action in equity—such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized or ordered or done any of the acts constituting in whole or in part any such violations. Those acts standing alone might be absolutely innocent, but if they have contributed in whole or in part to the violation by the corporation, they make the party guilty. * * * [51 Cong. Rec. 9681.]

* * *

Mr. TALCOTT of New York. Is that not true that the Sherman Act provides criminal penalties?

Mr. WEBB. It does.

Mr. TALCOTT of New York. And in a great many of the cases referred to in this act, does it not?

Mr. WEBB. I do not know that I understand my friend.

Mr. TALCOTT of New York. I mean in regard to a great many of the acts referred to in this law.

Mr. WEBB. If the acts complained of restrain trade, or attempt to monopolize, then the persons guilty of them subject themselves to criminal penalties under the Sherman law. This bill which we are now considering preserves that right and makes guilt personal, and that is the only way in which we have

undertaken to amend the Sherman antitrust law at all—that is, in making guilt personal [51 Cong. Rec. 16275].

* * * * *

Mr. FLOYD. * * * Keep in mind that we have not disturbed the text of the Sherman law. We have not disturbed the penal provisions in the existing antitrust laws, including the Sherman law. We have, on the contrary, supplemented the penal provisions of the Sherman law and of other existing antitrust laws. Section 12 of the House bill, now section 14 of this bill, makes guilt personal—and it was retained by the Senate, retained by the conferees, and is in the bill reported by the conferees in the exact wording in which it passed the House. (51 Cong. Rec. 16317.)

Mr. FLOYD. * * * The original personal-guilt clause of the House bill was embodied in section 12. It was adopted and was restored in committee, and it is now found in section 14 of the bill. It is in the exact words in which the provision passed this House. It will be remembered there was considerable controversy and debate over it, and I believe the final draft of the amendment adopted was made by the distinguished gentleman from Wisconsin [Mr. Lenroot]. The House adopted it, after a debate of several hours, with apparent satisfaction. The Senate amended it. The conferees insisted upon its restoration to the form in which it passed the House, and the Senate conferees yielded, and the personal guilt clause of the original bill is in this bill and applies to all of the penal sections of the antitrust laws.

The gentleman from Minnesota [Mr. Volstead] says that it may repeal the Sherman law. It is the exact penalty provided for in the Sherman law, but it goes further than the courts have ever gone in convicting officers, directors, or agents for violation of

the Sherman law. It provides that whenever a corporation shall be guilty of violating the penal provisions of the antitrust laws, the offense shall be deemed also the offense of the individual directors, officers, or agents of the corporation who have directed, ordered, or done, in whole or in part, any of the things that constitute a part of that violation. Is not that broader than the original law? In other words, under the Sherman law as it is now written you can convict an officer for violation of its provisions, but his acts must constitute the whole offense, or he must be a conspirator, and come within the rules of law governing conspiracies, but under this provision if he does any of the acts which constitute in whole or in part that violation, then he may be convicted as an individual [51 Cong. Rec. 16320].

APPENDIX C

United States District Court for the District of Columbia

Cr. No. 527–61

UNITED STATES OF AMERICA

v.

NORTH AMERICAN VAN LINES, INC.; AERO MAYFLOWER TRANSIT COMPANY, INC.; ALLIED VAN LINES, INC.; UNITED VAN LINES, INC.; JAMES D. EDGETT; PAUL CLARKE; JOHN SLOAN SMITH; EMMETT J. FLAVIN; LOREN A. LARIMORE; HOUSEHOLD GOODS CARRIERS' BUREAU.

[Filed January 29, 1962. HARRY M. HULL, *Clerk.*]

Memorandum Opinion

BURNITA SHELTON MATTHEWS, *District Judge.*

The two count indictment in this case charges four corporations, five of their officers and a trade association with violating Sections 1 and 3 of the Sherman Act, 15 U.S.C.A. 1 and 3.[1] In general the charge in

[1] These sections provide in pertinent part:

"Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of this title to be illegal shall be deemed guilty of a misdemeanor * * *." (Section 1.)

"Every contract, combination * * * or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Terri-

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each count is that the defendants engaged in a combination and conspiracy in unreasonable restraint of trade and commerce in the transportation of household goods. Count 1 relates to trade and commerce specified in Section 1 of the Sherman Act while Count 2 relates to trade and commerce specified in Section 3 of that Act.

Now before the court is a motion by the individual defendants to dismiss the indictment as to them. In support of their motion they assert that the indictment does not allege any acts done by them other than as representatives of their corporations in their capacity as corporate officers, and that acts authorized, ordered or done by officers of corporations in such capacity cannot constitute offenses by such corporate officers under Sections 1 and 3 of the Sherman Act but are covered only under Section 14 of the Clayton Act, 15 U.S.C.A. 24, which provides:

> Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor * * *.

Upon turning to the penalties prescribed under the mentioned provisions of the Sherman and Clayton Acts the significance of the issue here raised is manifest. Originally these penalties were identical, being a fine not exceeding $5,000 or imprisonment not ex-

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tory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *." (Section 3.)

ceeding one year, or both. However, in 1955 Congress changed Sections 1 and 3 of the Sherman Act by fixing the fine at not exceeding $50,000 [2] but left untouched the fine of not exceeding $5,000 under Section 14 of the Clayton Act.

Opposing the motion of the individual defendants to dismiss, the Government maintains that these defendants are charged in a dual capacity, that is, as representatives of their corporation in their corporate capacity and also as individuals in a personal capacity. The portion of the indictment labeled *Offense Charged* in respect of each count does not allege any capacity in which the individuals acted. Among introductory allegations in the indictment labeled *The Defendants* there appears a statement that each individual defendant is or has been an employee or officer of a specified corporate defendant and also a statement that acts charged in the indictment "to have been done by each defendant corporation were authorized, ordered or done by the officers, agents, employees or representatives of such defendants, including, but not limited to, those individuals named as defendants * * *, while actively engaged in the management, direction or control of its affairs." Although the quoted language may show that the individual defendants are being charged, at least in part, in their representative capacity, it cannot be said to limit the charges against them to acts so performed. But apparently it is this language upon which the individual defendants ground their claim that they have been charged only in their capacity as corporate officers.

It is suggested by the individual defendants that if the court cannot determine from the face of the indictment that they are charged only in their capacity as corporate officers then the court should order

[2] Chapter 281, 69 Stat. 282.

the United States to furnish a bill of particulars stating whether any of them is claimed to have authorized, ordered or done any of the acts alleged other than in his capacity as a corporate officer, and, if so, stating with particularity each such act and the capacity in which his claimed so to have acted. Bills of particulars and statements of the parties, however, should not be considered as a part of the indictment or as a substitute therefor or amendment thereto, and can neither weaken the indictment nor change the crime charged.[3] And in passing upon a motion to dismiss, the allegations of the indictment must be accepted by the court as written.[4]

Without qualification the indictment here charges each of the defendants with engaging in a combination and conspiracy in violation of Sections 1 and 3 of the Sherman Act. It is not drawn so as to limit the charges against these defendants to acts committed solely in their capacity as corporate officers, and for purposes of this motion the court accepts the indictment as written.

As already stated, the defendants here argue that Section 14 of the Clayton Act affords the Government its sole statutory basis for prosecuting them. Section 1 and Section 3 of the Sherman Act each describe those coming within its provisions as "Every person" doing the proscribed acts while Section 14 of the Clayton Act deals specifically with individual corporate officers by declaring that whenever a corpo-

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[3] *United States* v. *Comyns*, 1919, 248 U.S. 349; *Krause* v. *United States*, 8th Cir., 1920, 267 F. 183; *United States* v. *Dierker*, D.C. Pa., 1958, 164 F. Supp. 304; *United States* v. *Pennell*, D.C. Cal., 1956, 144 F. Supp. 320; *United States* v. *Lefkoff*, D.C. Tenn., 1953, 113 F. Supp. 551; *United States* v. *Johnson*, D.C. Del., 1944, 53 F. Supp. 167.

[4] *United States* v. *Latimore*, D.C.D.C., 1955, 127 F. Supp. 405, affirmed 232 F. 2d 334, 98 U.S. App. D.C. 77.

ration shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual officers, directors or agents of such corporation who shall have authorized, ordered or done any of the acts constituting in whole or in part such violation. In effect the argument of the defendants is that if corporate officers acting in their representative capacity ever were within Sections 1 and 3 of the Sherman Act then they were lifted out of these sections when Section 14 of the Clayton Act was adopted.

But Section 14 of the Clayton Act must be viewed in the light of its purpose and setting. "The Clayton Act, as its title and the history of its enactment disclose, was intended to supplement the purpose and effect of other antitrust legislation, principally the Sherman Act of 1890." *Standard Co.* v. *Magrane-Houston Co.*, 1921, 258 U.S. 346, 355.[5] Section 14 supplemented the existing laws by providing a specific statute under which a corporate officer, agent, or director could be held personally liable for contributing to a violation of an antitrust penal provision by his corporation even though his contribution, standing alone, might not be such a violation.[6] The legislative

[5] The Clayton Act is entitled "An Act To *supplement existing laws* against unlawful restraints and monopolies, and for other purposes." [Emphasis supplied.] 38 Stat. 730.

[6] One type of situation which Section 14 was designed to meet is described in *United States* v. *Atlantic Commission Co.*, D.C.N.C., 1942, 45 Supp. 187, 194 as follows:

"Under Section 1 of the Sherman Act, a combination may be charged with entering into contracts to unlawfully restrain trade, apart from the offense of conspiracy. In some of the earlier cases under the antitrust law, individual defendants sought to escape the application of the law on the ground that it was the corporate defendant that had entered into unlawful contracts and that its officers and agents could not be held unless they were shown to have participated in a conspiracy."

history of the Clayton Act makes it abundantly clear, however, that Congress did not intend by this section to supplant the penal provisions of the Sherman Act, or to relieve from liability any violators of such provisions. Representative Floyd, a member of the Judiciary Committee and floor leader in charge of Section 14, pointed this out in the debate on that section, saying:

> * * * I will say this: That this in no way affects the procedure under existing law, either criminal or civil. *If an individual is guilty of violating the Sherman law, he can be indicted independently of this provision;* * * *. [Emphasis supplied.] 51 Cong. Rec. 9679.

In explaining the conference report on the proposed Clayton Act to the House of Representatives Mr. Floyd further stated:

> *Keep in mind that we have not disturbed the text of the Sherman law. We have not disturbed the penal provisions in the existing antitrust laws, including the Sherman law. We have on the contrary, supplemented the penal provisions of the Sherman law and of other existing antitrust laws.* [Emphasis supplied.] 51 Cong. Rec. 16317.

Thereafter in debate Representative Floyd also said of Section 14:

> It * * * goes further than the courts have ever gone in convicting officers, directors, or agents for violation of the Sherman law. It provides that whenever a corporation shall be guilty of violating the penal provisions of the antitrust

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Similarly, if a corporate officer were charged with monopolizing under Section 2 of the Sherman Act, 15 U.S.C.A. 2, he might claim that only the corporation could be guilty of monopolizing and that he could not be held unless it were shown that he had engaged in a conspiracy to monopolize.

> laws, the offense shall be deemed also the offense of the individual directors, officers, or agents of the corporation who have directed, ordered, or done, in whole or in part, any of the things that constitute a part of that violation. Is not that broader than the original law? *In other words, under the Sherman law as it is now written you can convict an officer for violation of its provisions, but his acts must constitute the whole offense, or he must be a conspirator, and come within the rules of law governing conspiracies, but under this provision if he does any of the acts which constitute in whole or in part that violation, then he may be convicted* as an individual. [Emphasis supplied.] 51 Cong. Rec. 16320.

Senator Chilton, a member of the Senate Judiciary Committee which worked on the proposed law, said during the Senate debate:

> Mr. President, the first and chief proposition that the people laid down to us and that all of us have agreed upon is that we *will not touch a line or a section of the Sherman Antitrust law. It must remain as it is.* We had to consider certain things which have never of themselves been held to be a violation of that law, but which in connection with other things have been held to be a part of a conspiracy to violate it. [Emphasis supplied.] 51 Cong. Rec. 14327.

Several members of Congress stated in debate that Section 14 was not necessary and that anything this section was intended to accomplish could be done under the Sherman Act. For example, see the remarks of Representative Nelson, 51 Cong. Rec. 9169, Representative Green, 51 Cong. Rec. 9201, and Senator Shields, 51 Cong. Rec. 14214, 14225. The suggestion was made by Representative Volstead that this section would add nothing to the law and was simply being

put in "for buncombe" because of speeches and promises made during a political campaign. 51 Cong. Rec. 9079–9080. Opponents of the section expressed fear that it might weaken rather than strengthen the application of criminal penalties to corporate officers. This fear was based on the idea (1) that trial of an officer under Section 14 might require more evidence than under the Sherman Act, since under Section 14 a violation by the corporation as well as the individual defendant would have to be proved, 51 Cong. Rec. 9596, and (2) that this section was not as broad in its coverage as the general aiding and abetting law [7] which previously had been used to convict corporate officers and agents where they had not themselves directly violated the Sherman law but had aided or abetted such a violation. 51 Cong. Rec. 9681. But certainly no reasonable basis can be found in the legislative history for the contention that by Section 14 Congress intended or desired to limit in any way the application of any part of the Sherman Act. To the contrary, this history makes it plain that it was the purpose of Congress to maintain all the penal provisions of the Sherman Act in undiminished force.

Prior to the passage of the Clayton Act it had been held that corporate officers might be charged with conspiracy, as they are in the instant case, in direct violation of the Sherman Act.[8] And since the passage

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[7] Now 18 U.S.C.A. 2.

[8] *United States* v. *MacAndrews & Forbes Co.*, Cir. Ct., N.Y., 1906, 149 F. 823; *Patterson* v. *United States*, 6th Cir., 1915, 222 F. 599; *United States* v. *Swift*, D.C. Ill., 1911, 188 F. 92. See also *Nash* v. *United States*, 1913, 229 U.S. 373.

of the Clayton Act it has also been so held.* As was said in *United States* v. *Atlantic Commission Co.*, D.C.N.C., 1942, 45 Supp. 187, 194:

> * * * If the officer or agent is personally charged with participation in the conspiracy there is no necessity for the application of Section 14 of the Clayton Act. It is now well settled that officers and agents may be indicted with their corporation under the Sherman Act * * *. Inasmuch as officers and agents may be indicted with their corporation under the Sherman Act * * * and since they are here so indicted there is no necessity for the application of Section 14 of the Clayton Act. The corporate defendants and the individuals named in the indictment are charged with a conspiracy among themselves to restrain trade and commerce * * *. The charge in its entirety is under the Sherman Act.

The concept of the individual defendants that Sections 1 and 3 of the Sherman Act apply to individuals acting in their individual capacity but not to corporate officers acting in their corporate capacity is one to which this court cannot subscribe. Under the terms of Sections 1 and 3 of the Sherman Act *every person* who engages in the prohibited combination or conspiracy is included. These sections do not make a distinction between alleged conspirators who were corporate officers acting in a representative capacity on the one hand, and alleged conspirators acting in

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* *American Tobacco Co.* v. *United States*, 6th Cir., 1944, 147 F. 2d 93, rehearing denied 324 U.S. 891, affirmed 328 U.S. 781; *United States* v. *General Motors Corp.*, D.C. Ind., 1939, 26 F. Supp. 353, cert. denied 314 U.S. 618; *United States* v. *Atlantic Commission Co.*, D.C.N.D., 1942, 45 F. Supp. 187; *United States* v. *National Malleable & Steel Casting Co.*, D.C. Ohio, 1924, 6 F. 2d 40. *Meehan* v. *United States*, 6 Cir., 1926, 11 F. 2d 847; *Hughes* v. *Gault*, 1926, 271 U.S. 142.

their individual capacity on the other; nor does the general law on liability of corporate officers support such a distinction. The accepted rule is that officers, directors and agents of a corporation may be held criminally liable for their acts although performed in their official capacity but where they have neither actively participated in nor directed nor authorized a violation of law by their corporation they are not liable. 19 C.J.S., Corporations, Sec. 931; Fletcher, Cyclopedia Corporations, Perm Ed., Vol. 3, Sec. 1348. The antitrust cases decided prior to passage of the Clayton Act do not appear to depart from this general rule. See, for example, the discussion of liability in *United States* v. *Winslow,* D.C. Mass., 1912, 195 F. 578, 581. And the legislative history of the Clayton Act discloses no purpose to exempt from prosecution under the Sherman Act persons who have conspired while acting in the capacity of corporate officers.

Section 14 makes it a misdemeanor for an officer to authorize, order, or do anything which contributes in whole or in part to the guilt of his corporation. But aside from the question of whether he has become liable under Section 14, a corporate officer or director may have become liable under Section 1 or 3 of the Sherman Act by engaging in a conspiracy. Of course, if the officer engaged in such a conspiracy while acting within the scope of his authority and in the conduct of the corporation's business then his guilt could be imputed to the corporation, and the corporation as well as the officer could be found guilty under the Sherman Act. And in such situation he would have committed an offense under Section 14 of the Clayton Act as well. But this is not to say that the two offenses are identical. In order for a defendant to be found guilty under Section 14 the Government must prove that the corporation has violated a penal provision of the antitrust laws and that the defendant

officer has authorized, ordered, or done something under such circumstances as to have contributed to the corporation's violation. On the other hand, in order to find an officer guilty of conspiracy under Section 1 or 3 of the Sherman Act it need only be proved that the alleged conspiracy existed and that the defendant officer participated in an active way in the conspiracy. For purposes of convicting him it need not be proved that he acted under such circumstances as to make his corporation guilty or that his corporation was, in fact, guilty.

According to *Ehrlich* v. *United States*, 5th Cir., 1956, 238 F. 2d 481, 485:

> It is settled law, *United States* v. *Gilliland*, 312 U.S. 86, 61 S. Ct. 518, 85 L. Ed. 598, that where a single act violates more than one statute, the government may elect to prosecute under either. A defendant cannot complain merely because the charge against him is brought under the statute carrying the more serious penalties when two statutes punish the same general acts. *Rosenberg* v. *United States*, 346 U.S. 273, 73 S. Ct., 1152, 97 L. Ed. 1607; *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 73 S. Ct. 77, 97 L. Ed. 61; *Berra* v. *United States*, 351 U.S. 131, 76 S. Ct. 685.

In the *Rosenberg* case, *supra*, the claim was made among others that the Atomic Energy Act of 1946 superseded the Espionage Act of 1917 and rendered the District Court powerless to impose the death penalty under the 1917 Act. The following excerpt from the opinion of the court at page 294 relative to the treatment to be accorded two statutes upon the same subject is pertinent here:

> Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law: "At least where different proof is required

> for each offense, a single act or transaction may violate more than one criminal statute." *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45 (1952); see also *United States* v. *Noveck*, 273 U.S. 202, 206 (1927); *Gavieres* v. *United States*, 220 U.S. 338 (1911). Nor does the partial overlap of two statutes necessarily work a *pro tanto* repealer of the earlier Act. *Ibid.* "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible * * *. The intention of the legislature to repeal 'must be clear and manifest.' * * * It is not sufficient * * * 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnancy between the provisions of the new law, and those of the old.'" *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939).

I am aware of the five recent cases in which charges under either Section 1 or 2 or 3 of the Sherman Act were dismissed on the ground that corporate officers are indictable only under Section 14 of the Clayton Act where the offenses charged against them are alleged to have been done in their capacities as officers. These cases are: *United States* v. *National Dairy Products Corp.*, W.D. Mo., 1961, 196 F. Supp. 155; *United States* v. *A. P. Woodson Company*, D.C.D.C. 1961, 198 F. Supp. 582; *United States* v. *American Optical Company*, D.C.E.D. Wis., 1961, Crim. Action No. 61-CR-82; *United States* v. *Milk Distributors Association, Inc.*, D.C. Md., 1961, Crim. No. 25658; and *United States* v. *General Motors Corp.*, S.D. Cal., 1962, No. 30,132—Crim. In at least four of these cases the District Court appears to have gone beyond the words of the indictment and to have considered a

bill of particulars or statements outside the indictment in order to find that the defendant officers were charged solely in their capacity as officers. The indictment here does not restrict the charges against the individual defendants to acts allegedly done in their capacity as corporate officers. But assuming arguendo that it does, I do not find the five last mentioned cases persuasive.

I am of the opinion that the claim of the individual defendants that Section 14 of the Clayton Act affords the Government its sole statutory basis for prosecuting them is not well founded, and that under the allegations of the indictment they are subject to prosecution under Section 1 and 3 of the Sherman Act. Accordingly the motion to dismiss will be denied. An appropriate proposed order should be submitted.

(S) BURNITA SHELTON MATTHEWS,
Judge.

JANUARY 29, 1962.

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